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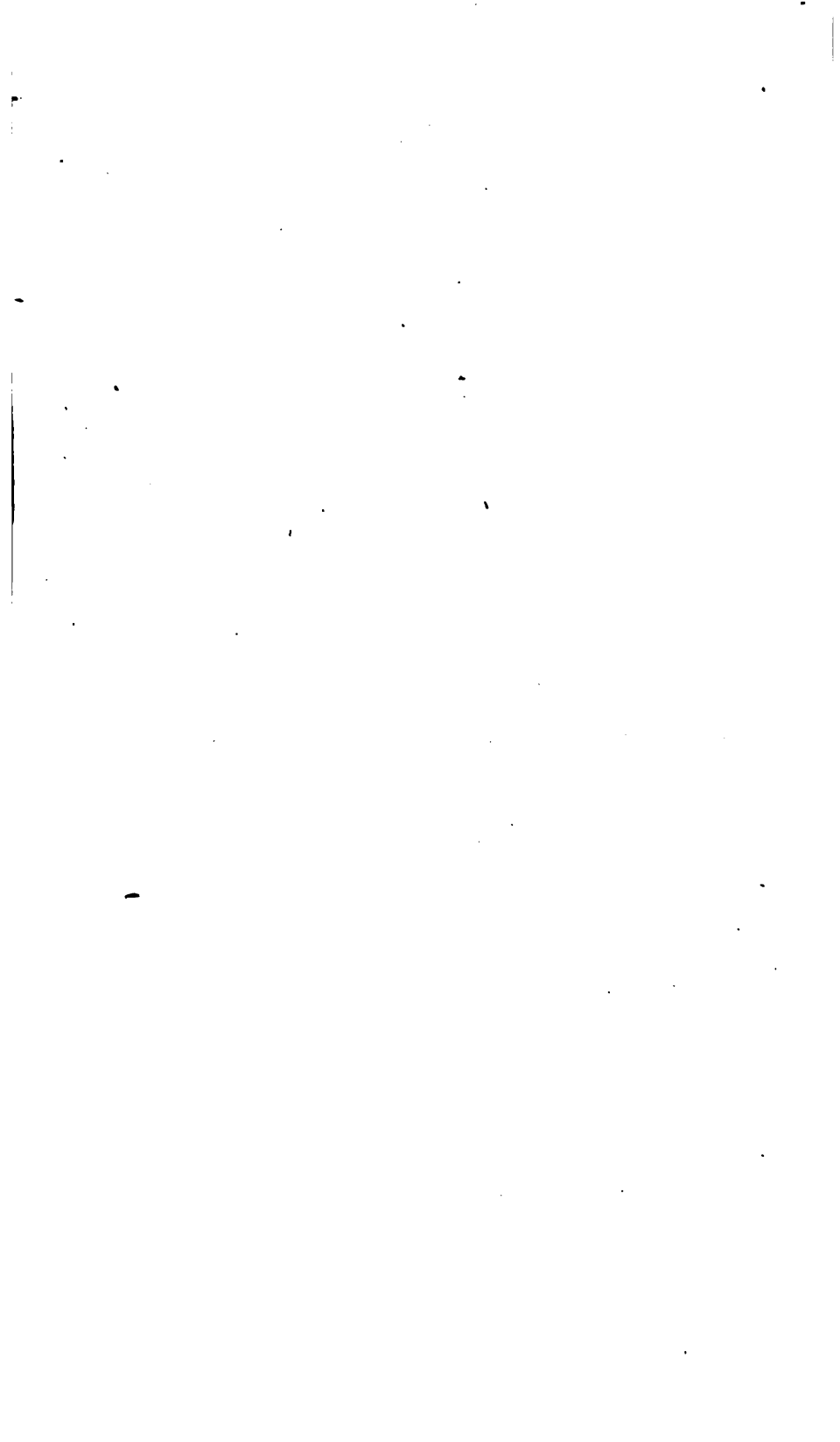
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1889.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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AMERICAN DECISIONS.

VOL. LXXXII.

The cases re-reported in this volume will be found originally reported in the following State Reports:

MICHIGAN REPORTS.	Vols. 10, 11.	1862.
MINNESOTA REPORTS.	Vols. 7, 8.	1862.
MISSOURI REPORTS.	Vols. 32, 33.	1862.
NEW HAMPSHIRE REPORTS. . . .	Vols. 43, 44.	1862.
VROOM'S NEW JERSEY L. REPORTS. .	Vol. 1.	1860.
MCCARTER'S NEW JERSEY EQ. REPS.	Vols. 1, 2.	1862, 1863.
NEW YORK REPORTS.	Vols. 24, 25, 26.	1862.
JONES'S N. CAROLINA EQ. REPORTS. .	Vol. 6.	1862.
JONES'S N. CAROLINA LAW REPORTS.	Vol. 8.	1862.
OHIO STATE REPORTS.	Vols. 13, 14.	1861, 1862.
OREGON REPORTS.	Vol. 2.	1862.
PENNSYLVANIA STATE REPORTS. .	Vols. 41, 42, 43.	1862.
RHODE ISLAND REPORTS.	Vol. 7.	1862.
TEXAS REPORTS.	Vol. 26.	1862.
VERMONT REPORTS	Vol. 35.	1862.
WISCONSIN REPORTS.	Vols. 15, 16.	1862.
ALABAMA REPORTS.	Vol. 38.	1863.
CALIFORNIA REPORTS.	Vol. 21.	1862, 1863.

SCHEDULE

OF

REPORTS FROM WHICH CASES HAVE BEEN SELECTED

FOR THE

AMERICAN DECISIONS.

Note: Reports are in parentheses, and the number of the American Decisions in which they are re-reported is in heavy-faced letter.

ALABAMA—(1 Minor) 12; (1 Stew.) 12; (2 Stew.) 19, 20; (3 Stew.) 20, 21; (1 Stew. & P.) 21; (1, 2, 3 Stew. & P.) 22; (4, 5 Stew. & P.) 24; (5 Stew. & P., and 1 Porter) 26; (1, 2 Porter) 27; (3, 4 Porter) 29; (4, 5, 6 Porter) 30; (6, 7 Porter) 31; (8, 9 Porter) 33; (1) 34, 35; (2, 3) 36; (3, 4) 37; (4, 5) 39; (6, 7) 41; (7, 8) 42; (9, 10) 44; (11, 12) 46; (13, 14, 15) 48; (15, 16) 50; (17, 18) 52; (18, 19) 54; (20, 21) 56; (22, 23) 58; (24, 25) 60; (26, 27) 62; (28, 29) 65; (29, 30, 31) 68; (31, 32, 33) 70; (33, 34, 35) 73; (35, 36, 37) 76; (37, 38) 79; (38) 81, 82.

ARKANSAS—(1, 2) 33; (2) 35; (3) 36; (4) 37, 38; (5) 39, 41; (6) 42; (7, 8) 44, 46; (8, 9) 47; (9, 10) 50; (10, 11) 52; (11, 12) 54; (12, 13) 56; (13, 14) 58; (14, 15) 60; (15, 16) 63; (17, 18) 65; (18, 19) 68; (19) 70; (20) 73; (21, 22) 76; (22, 23) 79; (24) 81.

CALIFORNIA—(1) 52, 54; (2) 56; (3) 58; (4) 60; (5) 63; (6) 65; (7, 8) 68; (9, 10, 11) 70; (12, 13, 14) 73; (14, 15, 16, 17) 76; (17, 18, 19) 79; (19, 20, 21) 81; (21) 82.

CONNECTICUT—(Kirby, and 1, 2 Root) 1; (1, 2 Day) 2; (3 Day) 3; (4 Day) 4; (5 Day) 5; (1) 6, 7; (2) 7; (3) 8; (4) 10; (5) 13; (6) 16; (7) 18; (8) 20; (9) 21; (10) 25, 26, 27; (11) 27, 29; (12) 30, 31; (13) 33; (13, 14) 35; (14) 36; (15) 38, 39; (16) 41; (17, 18) 44; (18) 46; (19) 48; (19, 20) 50; (20) 52; (21) 54; (21, 22) 56; (22) 58; (23) 60; (23, 24) 63; (25) 65; (25, 26) 68; (27) 71; (28) 73; (29) 76; (29, 30) 79; (31) 81.

DELAWARE—(1 Hart.) 23, 25, 26, 27; (2 Hart.) 29, 30, 31, 33; (4 Hart.) 42, 44; (5 Hart.) 48, 60; (1 Houst.) 63, 68, 71; (2 Houst., 2 Del. Ch.) 73; (2 Houst.) 81.

FLORIDA—(1) 44, 46; (2) 48, 50; (3) 52; (4) 54, 56; (5) 58; (6) 63, 65; (7) 68; (8) 71, 73; (9) 76, 79; (10) 81.

GEORGIA—(1 T. U. P. Charlton) 4; (1) 44; (2, 3) 46; (4, 5) 48; (6, 7) 50; (8, 9) 52; (9, 10) 54; (11, 12) 56; (12, 13, 14) 58; (15, 16) 60; (17, 18, 19)

63; (19, 20) 65; (21, 22, 23) 68; (24, 25, 26) 71; (27, 28) 73; (29) 74; (29, 30, 31) 76; (31, 32) 79; (33) 81.

ILLINOIS—(Breese) 2; (1 Scam.) 25, 26, 27, 28, 29, 30, 32, 33; (2 Scam.) 33, 35; (3 Scam.) 36; (3, 4 Scam.) 38; (4 Scam.) 39; (1 Gilm.) 41; (2 Gilm.) 43; (3 Gilm.) 44; (4 Gilm.) 46; (5 Gilm.) 48, 50; (11) 50; (11, 12) 52; (12, 13) 54; (13, 14) 56; (14, 15) 58; (15) 60; (16) 61; (16, 17) 63; (17, 18) 65; (18, 19) 68; (19, 20, 21) 71; (21, 22, 23) 74; (23, 24, 25) 76; (25, 26, 27) 79; (27, 28, 29, 30) 81.

INDIANA—(1 Blackf.) 12; (2 Blackf.) 13, 20, 21; (3 Blackf.) 25, 26; (4 Blackf.) 28, 29, 30, 32; (5 Blackf.) 32, 33, 35, 36; (6 Blackf.) 36, 38, 39; (7 Blackf.) 39, 41, 43; (8 Blackf.) 44, 46; (1) 48, 50; (2) 52; (2, 3) 54; (3) 56; (4) 58; (5, 6) 61; (6, 7) 63; (7, 8) 65; (9, 10) 68; (10, 11) 71; (12, 13) 74; (14, 15) 77; (16, 17) 79; (18, 19) 81.

IOWA—(Morris) 39, 41, 43; (1 G. Greene) 46, 48, 50; (2 G. Greene) 52; (3 G. Greene) 54, 56; (4 G. Greene) 61; (1, 2) 63; (2) 56; (3, 4) 66; (4, 5) 68; (6, 7) 71; (7, 8, 9, 10) 74; (10, 11) 77; (11, 12) 79; (13, 14) 81.

KANSAS—(1) 81.

KENTUCKY—(1 Sneed) 2; (Hardin) 3; (1 Bibb) 4; (2 Bibb) 4, 5; (3 Bibb) 6; (4 Bibb) 7; (1 A. K. Marsh.) 10; (2 A. K. Marsh., and Litt. Sel. Cas.) 12; (3 A. K. Marsh., and 1, 2 Litt.) 13; (3, 4 Litt.) 14; (1, 2 Mon., and 5 Litt.) 15; (3, 4 Mon.) 16; (5, 6 Mon.) 17; (7 Mon.) 18; (1, 2, 3 J. J. Marsh.) 19; (3, 4, 5 J. J. Marsh.) 20; (5, 6 J. J. Marsh.) 22; (7 J. J. Marsh.) 22, 23; (1 Dana) 25; (2 Dana) 26; (3 Dana, 28; (4 Dana) 29; (5 Dana) 30; (6, 7 Dana) 32; (8, 9 Dana) 33; (9 Dana, and 1 B. Mon.) 35; (1, 2 B. Mon.) 36; (2, 3 B. Mon.) 38; (3, 4 B. Mon.) 39; (4, 5 B. Mon.) 41; (5, 6 B. Mon.) 43; (6 B. Mon.) 44; (7 B. Mon.) 45; (7, 8 B. Mon.) 46; (8, 9 B. Mon.) 48; (9, 10 B. Mon.) 50; (10, 11 B. Mon.) 52; (12 B. Mon.) 54; (13 B. Mon.) 56; (14 B. Mon.) 58; (14, 15 B. Mon.) 61; (15, 16 B. Mon.) 63; (17 B. Mon.) 66; (18 B. Mon.) 68; (1 Metc.) 71; (2 Metc.) 74; (3 Metc.) 77, 79; (4 Metc.) 81.

LOUISIANA—(1, 2, 3 Mart.) 5; (3, 4 Mart.) 6; (5, 6, 7 Mart.) 12; (8, 9, 10, 11, 12 Mart.) 13; (1, 2 Mart., N. S.) 14; (3 Mart., N. S.) 15; (4, 5 Mart., N. S.) 16; (6 Mart., N. S.) 17; (7 Mart., N. S.) 18; (8 Mart., N. S.) 19, 20; (1, 2) 20; (2, 3) 22; (3, 4) 23; (5, 6) 25; (6, 7) 26; (8) 28; (9, 10) 29; (11) 30; (12) 32; (13, 14) 33; (15, 16) 35; (17, 18, 19) 36; (1 Rob.) 36; (1, 2, 3 Rob.) 38; (4, 5, 6 Rob.) 39; (6, 7, 8, 9 Rob.) 41; (10, 11, 12 Rob.) 43; (1 Ann.) 45; (2 Ann.) 46; (3 Ann.) 48; (4 Ann.) 50; (5 Ann.) 52; (6 Ann.) 54; (7 Ann.) 56; (8 Ann.) 58; (9 Ann.) 61; (10 Ann.) 63; (11 Ann.) 66; (12 Ann.) 68; (13 Ann.) 71; (14 Ann.) 74; (15 Ann.) 77; (16 Ann.) 79.

MAINE—(1 Greenl.) 10; (2 Greenl.) 11; (3 Greenl.) 14; (4 Greenl.) 16; (5 Greenl.) 17; (6 Greenl.) 19; (6, 7 Greenl.) 20; (7, 8 Greenl.) 23; (8, 9 Greenl.) 23; (10 Me.) 25; (11) 25, 26; (12) 28; (13) 29; (14) 30, 31; (15) 32; (15, 16) 33; (17) 35; (18, 19) 36; (20) 37; (21, 22) 38; (22, 23) 39; (23, 24) 41; (25) 43; (26) 45; (26, 27) 46; (28, 29) 48; (29, 30, 31) 50; (31, 32) 52; (32, 33) 54; (34, 35) 56; (35, 36, 37) 58; (37) 59; (38) 61; (39, 40) 63; (41, 42) 66; (43, 44) 69; (45, 46) 71; (46, 47) 74; (48, 49) 77; (50) 79; (51) 81.

MARYLAND—(1, 2, 3, 4 H. & M.) 1; (1 H. & J.) 2; (2 H. & J.) 3; (3 H. & J.) 5, 6; (4 H. & J.) 7; (5 H. & J.) 9; (6 H. & J.) 14; (7 H. & J.) 16; (1 Bl. Ch.) 17, 18; (1 H. & G.) 18; (1, 2 Gill & J.) 19; (2 Bl. Ch., and 2, 3 G.

& J.) 20; (3 Bl. Ch., and 3 G. & J.) 22; (4, 5 G. & J.) 23; (5, 6 G. & J.) 25; (6, 7 G. & J.) 26; (7 G. & J.) 28; (8 G. & J.) 29; (9 G. & J.) 31; (10 G. & J.) 32; (11 G. & J.) 33, 35, 37; (12 G. & J.) 38; (1 Gill) 39; (2 Gill) 41; (3 Gill) 43; (4 Gill) 45; (5, 6 Gill) 46; (6, 7 Gill) 48; (8 Gill) 50; (9 Gill) 52; (1) 54; (2, 3) 56; (4, 5) 59; (5, 6, 7) 61; (8) 63; (9) 66; (10, 11) 69; (12, 13) 71; (14, 15) 74; (16, 17) 77; (17, 18) 79; (18, 19) 81.

MASSACHUSETTS—(Quincy) 1; (1) 2; (2, 3, 4) 3; (5, 6) 4; (7, 8) 5; (9, 10, 11) 6; (12, 13, 14) 7; (15, 16) 8; (17) 9; (1 Pick.) 11; (2 Pick.) 13; (3 Pick.) 15; (4, 5 Pick.) 16; (6 Pick.) 17; (7, 8, 9 Pick.) 19; (9, 10 Pick.) 20; (11, 12 Pick.) 22; (12, 13 Pick.) 24; (13, 14, 15 Pick.) 25; (15, 16 Pick.) 26; (16, 17 Pick.) 28; (18 Pick.) 29; (19 Pick.) 31; (20 Pick.) 32; (22 Pick.) 33; (23 Pick.) 34; (24 Pick., and 1, 2 Met.) 35; (2, 3 Met.) 37; (3, 4, 5 Met.) 38; (5, 6, 7 Met.) 39; (7, 8 Met.) 41; (9, 10 Met.) 43; (11, 12 Met.) 45; (12, 13 Met.) 46; (1, 2 Cush.) 48; (3, 4 Cush.) 50; (5 Cush.) 51; (5, 6 Cush.) 52; (6 Cush.) 53; (7, 8 Cush.) 54; (9 Cush.) 55, 57; (10 Cush.) 57; (11, 12 Cush.) 59; (1, 2 Gray) 61; (3 Gray) 63; (4 Gray) 64; (5, 6, 7 Gray) 66; (8, 9, 10 Gray) 69; (10, 11, 12 Gray) 71; (12, 13, 14 Gray) 74; (14, 15, 16) 77; (1, 2 Allen) 79; (3 Allen) 80; (3, 4, 5 Allen) 81.

MICHIGAN—(1 Doug.) 40, 41; (2 Doug.) 43, 45, 47; (1) 48, 51, 53; (2) 55, 57; (2, 3) 59; (3) 61, 64; (4) 66, 69; (5) 71; (5, 6) 72; (6, 7) 74; (8, 9) 77; (9) 80; (9, 10) 81; (10, 11) 82.

MINNESOTA—(1) 55, 61, 66, 69; (2) 72; (3) 74; (4, 5) 77; (5, 6) 80; (7, 8) 82.

MISSISSIPPI—(Walker) 12; (1 How.) 26, 28, 29, 31; (2 How.) 32; (3, 4 How.) 34; (4, 5 How.) 35; (5 How.) 37; (6 How.) 38; (7 How., and 1 Smedes & M.) 40; (2, 3 Smedes & M.) 41; (4, 5 Smedes & M.) 43; (5, 6, 7 Smedes & M.) 45; (8, 9 Smedes & M.) 47; (9, 10 Smedes & M.) 48; (11 Smedes & M.) 49; (12, 13 Smedes & M.) 51; (13, 14 Smedes & M.) 53; (23) 55, 57; (24, 25) 57; (25, 26) 59; (27, 28) 61; (28, 29, 30) 64; (31, 32) 66; (33, 34) 69; (35, 36) 72; (36) 74; (37, 38) 75; (38, 39) 77; (39) 80.

MISSOURI—(1) 13, 14; (2) 22; (3) 22, 23, 25, 26; (4) 28, 29, 31; (5) 31, 32; (6) 34, 35; (7) 37, 38; (8) 40, 41; (9) 43; (9, 10) 45; (10, 11) 47; (11, 12) 49; (12) 51; (13) 53; (14, 15) 55; (15, 16, 17) 57; (17, 18, 19) 59; (19, 20) 61; (20, 21, 22) 64; (22, 23, 24) 66; (24, 25, 26) 69; (26, 27) 72; (28) 75; (29, 30, 31) 77; (31) 80; (32, 33) 82.

NEW HAMPSHIRE—(1) 8; (2) 9; (3) 14; (4) 17; (5) 20, 22; (6) 23, 25, 26; (7) 26, 28; (8) 28, 29, 31; (9) 31, 32; (10) 34; (11) 35; (12) 37; (13) 38; (13, 14) 40; (15, 16) 41; (16, 17) 43; (18) 45, 47; (19) 49; (19, 20) 51; (21, 22) 53; (22, 23, 24) 55; (24, 25, 26) 57; (26, 27, 28) 59; (28, 29) 61; (30, 31, 32) 64; (33, 34) 66; (34, 35) 69; (36, 37) 72; (37, 38, 39) 75; (40, 41, 42) 77; (42, 43) 80; (43, 44) 82.

NEW JERSEY—(Coxe) 1; (1 Pen.) 2; (2 Pen.) 4; (1 South.) 7; (2 South.) 8; (1 Halst.) 10; (2 Halst.) 11; (3 Halst.) 14; (4 Halst.) 17; (5 Halst.) 18; (6 Halst.) 19, 20; (1 Sax., 7 Halst.) 21; (1 Gr., 1 Sax., 7 Halst.) 22; (1 Sax., 1 Gr.) 23; (1, 2 Gr.) 25; (2 Gr.) 27; (3 Gr.) 28, 29; (2 Gr. Ch.) 29; (1 Harr., 3 Gr. Ch.) 31; (1 Harr., 1 Gr. Ch.) 32; (2 Harr., 1 Gr. Ch.) 34; (1 Gr. Ch., 2, 3 Harr.) 35; (3 Harr.) 37; (3 Gr. Ch., 1 Spencer, 3, 4 Harr.) 38; (1 Spencer, 3 Gr. Ch.) 40; (3 Gr. Ch.) 41; (1 Spencer, 3 Gr. Ch., 1 Halst. Ch.) 43; (1 Spencer, 1 Halst. Ch.) 45; (1 Zab., 2 Halst. Ch.) 47; (2 Zab., 3 Halst. Ch.) 51; (2, 3 Zab.) 53; (3 Zab., 4 Halst. Ch.) 55; (3 Zab., 1 Stock. Ch.) 57; (4 Zab., 1 Stock. Ch.) 59; (4 Zab.) 61; (4 Zab.,

1 Dutch., 1, 2, 3 Stock. Ch.) 64; (2, 3 Stock. Ch.) 66; (1 Dutch.) 67; (2 Dutch., 3 Stock. Ch.) 69; (3 Dutch., 1 Beasley's Eq.) 72; (4 Dutch.) 75; (4 Dutch., 2 Beasley's Eq.) 78; (5 Dutch., 1 McCarter) 80; (1 Vroom, 1, 2 McCarter's Eq.) 82.

NEW YORK—(1, 2 Johns. Cas.) 1; (3 Johns. Cas., 1, 2 Cai. Cas., 1, 2, 3 Cai.) 2; (1, 2, 3 Johns.) 3; (4, 5 Johns.) 4; (6, 7, 8 Johns.) 5; (9, 10, 11 Johns.) 6; (12, 13, 14 Johns., 1, 2 Johns. Ch.) 7; (15, 16, 17 Johns., 3, 4 Johns. Ch.) 8; (18 Johns., 5 Johns. Ch.) 9; (19 Johns., 6 Johns. Ch.) 10; (20 Johns., 7 Johns. Ch.) 11; (1 Cow.) 13; (Hop. Ch., and 2 Cow.) 14; (3, 4, 5 Cow.) 15; (6 Cow.) 16; (7 Cow.) 17; (8, 9 Cow.) 18; (1 Paige, 1, 1 Wend.) 19; (2, 3 Wend.) 20; (2 Paige, 4, 5, 6 Wend.) 21; (2, 3 Paige, 6, 7, 8 Wend.) 22; (3 Paige) 23, 24; (8, 9, 10 Wend.) 24; (4 Paige, 10, 11 Wend.) 25; (4 Paige, 11, 12, 13 Wend.) 27; (5 Paige, 13, 14 Wend.) 28; (6 Paige) 29; (15, 16 Wend.) 30; (6, 7 Paige, 17, 18 Wend.) 31; (7 Paige, 19, 20 Wend.) 32; (7, 8 Paige, 21, 22 Wend.) 34; (23, 24, 25 Wend., 8 Paige) 35; (25, 26 Wend., 1, 2 Hill, 9 Paige) 37; (9 Paige, 2, 3 Hill) 38; (10 Paige, 4, 5, 6 Hill) 40; (6 Hill) 41; (7 Hill, 10, 11 Paige) 42; (1, 2 Denio, 11 Paige, 1 Barb. Ch.) 43; (1, 2 Barb. Ch., 3 Denio) 45; (4, 5 Denio, 2 Barb. Ch.) 47; (3 Barb. Ch., 5 Denio) 49; (1, 2) 49; (2, 3) 51; (3, 4) 53; (4, 5, 6) 55; (6, 7) 57; (7, 8, 9) 59; (9, 10) 61; (11, 12) 62; (12, 13) 64; (13, 14) 67; (15, 16) 69; (17, 18) 72; (18, 19, 20) 75; (21, 22) 78; (23, 24) 80; (24, 25, 26) 82.

NORTH CAROLINA—(1 Mart., 1 Hayw., 1 Tayl.) 1; (2 Hayw., 1 Conf.) 2; (1 Murph.) 3, 4; (2 Murph.) 5; (1, 2 Law Rep.) 6; (1 T. R.) 7; (3 Murph., 1 Hawks) 9; (2 Hawks) 11; (3 Hawks) 14; (4 Hawks) 15; (1 Dev.) 17; (2 Dev.) 18, 21; (1 Dev. Eq.) 18; (3 Dev., 2 Dev. Eq.) 22, 24; (4 Dev., 2 Dev. Eq.) 25; (4 Dev., 2 Dev. Eq., 1 Dev. & B., 1 Dev. & B. Eq.) 27; (1, 2 Dev. & B., 1 Dev. & B. Eq.) 28, 30; (1 Dev. & B. Eq., 2 Dev. & B.) 31; (3, 4 Dev. & B., 2 Dev. & B. Eq.) 32; (4 Dev. & B., 2 Dev. & B. Eq.) 34; (1 Ired.) 35; (1 Ired. Eq.) 36; (2 Ired.) 37; (2, 3 Ired., 2 Ired. Eq.) 38; (3, 4 Ired., 2, 3 Ired. Eq.) 40; (4, 5 Ired., 3 Ired. Eq.) 42; (5, 6 Ired., 3, 4 Ired. Eq.) 44; (6, 7 Ired., 4 Ired. Eq.) 45; (7, 8 Ired., 4, 5 Ired. Eq.) 47; (8, 9 Ired., 5 Ired. Eq.) 49; (9, 10, 11 Ired., 6 Ired. Eq.) 51; (11 Ired., 7 Ired. Eq.) 53; (12, 13 Ired., 8 Ired. Eq.) 55; (13 Ired., 8 Ired. Eq., Busbee L., Busbee Eq.) 57; (Busbee L., 1 Jones L., Busbee Eq., 1 Jones Eq.) 59; (1, 2 Jones L., 1, 2 Jones Eq.) 62; (2 Jones Eq., 2, 3 Jones L.) 64; (3, 4 Jones L., 2, 3 Jones Eq.) 67; (3 Jones Eq., 4, 5 Jones L.) 69; (5, 6 Jones L., 4 Jones Eq.) 72; (4, 5 Jones Eq., 7 Jones L.) 75; (5, 6 Jones Eq., 7, 8 Jones L.) 78; (8 Jones L.) 80; (6 Jones Eq., 8 Jones L.) 82.

OHIO—(1) 13; (2) 15; (3) 17; (4) 19, 20; (5) 22, 24; (6) 25, 27; (7) 28, 30; (8) 31, 32; (9) 34; (10) 36; (11) 37, 38; (12) 40; (13) 42; (14, 15) 45; (16) 47; (17) 49; (18) 51; (19) 53; (20) 55; (1, 2 Ohio St.) 59; (3, 4 Ohio St.) 62; (4, 5 Ohio St.) 64; (5, 6 Ohio St.) 67; (7, 8 Ohio St.) 70; (8, 9) 72; (10, 11) 78; (12) 80; (13, 14) 82.

OREGON—(1) 62, 75; (1, 2) 80; (2) 82.

PENNSYLVANIA—(1 Add., 1, 2, 3 Dall., 1, 2 Yeates) 1; (1 Bin., 3, 4 Yeates) 2; (2 Bin.) 4; (3, 4 Bin.) 5; (5, 6 Bin.) 6; (1, 2 Serg. & R.) 7; (3, 4 Serg. & R.) 8; (5, 6 Serg. & R.) 9; (7 Serg. & R.) 10; (8, 9 Serg. & R.) 11; (10 Serg. & R.) 13; (11, 12 Serg. & R.) 14; (13 Serg. & R.) 15; (14, 15, 16 Serg. & R.) 16; (17 Serg. & R.) 17; (1 Rawle) 18; (2 Rawle) 19; (3

Rawle, 1, 2 Penr. & W.) 21; (3 Rawle, 2, 3 Penr. & W.) 23, 24; (4 Rawle, 1, 2 Watts) 26; (4 Rawle, 2, 3 Watts) 27; (5 Rawle, 4 Watts) 28; (1 Whart.) 29; (1, 2 Whart., 5 Watts) 30; (6 Watts, 3 Whart.) 31; (7 Watts) 32; (4 Whart.) 33; (8, 9 Watts, 4, 5 Whart.) 34; (9, 10 Watts, 6 Whart.) 36; (6 Whart., 1, 2, 3 Watts & S.) 37; (3 Watts & S.) 38; (3, 4, 5 Watts & S.) 39; (5, 6 Watts & S.) 40; (7, 8, 9 Watts & S.) 42; (1, 2 Pa. St.) 44; (2, 3, 4, 5) 45; (5, 6, 7) 47; (8, 9, 10) 49; (10, 11, 12) 51; (13, 14, 15) 53; (16, 17, 18) 55; (18, 19, 20) 57; (20, 21) 59; (22) 60; (22, 23, 24) 62; (24, 25) 64; (26, 27) 67; (28, 29) 70; (29, 30, 31, 32) 72; (32, 33, 34) 75; (35, 36, 37) 78; (38, 39, 40, 41) 80; (41, 42, 43) 82.

RHODE ISLAND—(1) 19, 26, 51, 53; (2) 55, 57, 60; (3) 62; (3, 4) 67; (4, 5) 70; (5) 73; (6) 75, 78; (7) 80, 82.

SOUTH CAROLINA—(1, 2 Bay, 1 Desan. Eq.) 1; (2 Desan. Eq., 1 Brev.) 2; (2 Brev.) 3; (3 Desan. Eq., 2 Brev.) 4; (3 Desan. Eq., 3 Brev.) 5; (4 Desan. Eq., 3 Brev.) 6; (1 Nott & M.) 9; (1 Nott & M., 1 McCord) 10; (1, 2 Mill) 12; (2 McCord) 13; (1 Harp. Eq.) 14; (3 McCord) 15; (1, 2 McCord Ch.) 16; (4 McCord) 17; (1 Harp.) 18; (1 Bai.) 19; (1, 2 Bai., 1 Bai. Eq.) 21; (2 Bai., 1 Bai. Eq., 1 Rich. Eq.) 23; (1 Rich. Eq.) 24; (1 Hill, 1 Hill Ch.) 26; (2 Hill, 1, 2 Hill Ch.) 27; (2 Hill Ch.) 29; (3 Hill, 1 Riley, 1 Riley Ch., 2 Hill Ch.) 30; (Dudley) 31; (Rice) 33; (Cheves) 34; (1 McMull.) 36; (1 McMull. Eq., 2 McMull.) 37; (2 McMull., 1 Spears Eq.) 39; (1 Spears, 1 Spears Eq.) 40, 42; (1 Rich. Eq., 1 Rich.) 2 Spears) 42; (1, 2 Rich., 1, 2 Rich. Eq.) 44; (2, 4 Rich.) 45; (2 Rich. Eq.) 46; (1 Strob. Eq., 1, 2 Strob.) 47; (2, 3 Strob., 2 Strob. Eq.) 49; (3, 4 Strob., 3 Strob. Eq.) 51; (4, 5 Strob., 4 Rich., 4 Strob. Eq.) 53; (3, 4 Rich. Eq., 4, 5, 6 Rich.) 55; (4 Rich. Eq., 5 Rich.) 57; (5, 6 Rich. Eq., 6 Rich.) 60; (6, 7 Rich. Eq., 7, 8 Rich.) 62; (7, 8 Rich. Eq., 8, 9 Rich. L.) 64; (9, 10 Rich. L.) 67; (8, 9 Rich. Eq., 10, 11 Rich. L.) 70; (10 Rich. Eq., 11 Rich. L.) 73; (12 Rich. L., 11 Rich. Eq.) 75; (12 Rich. L., 11, 12 Rich. Eq.) 78.

TEXAS—(1 Overt.) 3; (1 Cooke, 2 Overt.) 5; (3, 4, 5 Hay.) 9; (Peck) 14; (M. & Y. 17; (1, 2, 3 Yerg.) 24; (4, 5 Yerg.) 29; (6, 7 Yerg.) 27; 8 Yerg.) 29; (9, 10 Yerg.) 30; (10 Yerg.) 31; (1 Meigs) 33; (1 Humph.) 34; (2 Humph.) 36, 37; (3 Humph.) 39; (4 Humph.) 40; (5 Humph.) 42; (6 Humph.) 44; (7 Humph.) 46; (8 Humph.) 47; (8, 9 Humph.) 49; (9, 10 Humph.) 51; (10, 11 Humph.) 53; (1 Swan) 55, 57; (2 Swan) 58; (1 Sneed) 60; (1, 2 Sneed) 62; (2 Sneed) 64; (3 Sneed) 65; (3, 4 Sneed) 67; (4, 5 Sneed) 70; (5 Sneed, 1, 2 Head) 73; (2, 3 Head) 75; (1 Coldwell) 78.

TEXAS—(1) 46; (2) 47; (3) 49; (4, 5) 51; (5, 6) 55; (6) 56; (7, 8, 9) 58; (9, 10, 11) 60; (11, 12, 13) 62; (13, 14, 15) 65; (16, 17, 18) 67; (18, 19, 20) 70; (20, 21, 22) 73; (22) 75; (23, 24) 76; (25, 26 Supp.) 78; (26) 80, 82.

VERMONT—(1 N. Chip., 1 D. Chip.) 1; (1, 2 Tyler) 2; (1 D. Chip.) 6, 12; (1 Aik., 2 D. Chip.) 15; (2 Aik.) 16; (1) 18; (2) 19, 21; (3) 21, 23; (4) 23, 24; (5) 26; (6) 27; (7) 29; (8) 30; (9) 31; (10) 33; (11) 34; (12) 36; (13) 37; (14) 39; (15) 40; (16, 17) 42; (17, 18) 44; (18, 19) 46; (19) 47; (20) 49; (20, 21) 50; (21, 22) 52; (22, 23) 54; (23) 56; (24, 25) 58; (25, 26) 60; (26, 27) 62; (27, 28) 65; (28, 29) 67; (29) 70; (30, 31) 73; (31, 32) 76; (32, 33) 78; (33, 34) 80; (35) 82.

VIRGINIA—(1 Jeff., 1, 2 Wash., 1, 2 Call) 1; (3, 4, 5 Call) 2; (1, 2 Hen. & M., 6 Call) 3; (4 Hen. & M., 1 Munf.) 4; (1 Va. Cas., 2, 3 Munf.) 5; (4 Munf.) 6; (5 Munf.) 7; (6 Munf.) 8; (1 Gilm.) 9; (1 Rand.) 10; (2 Rand.) 14; (3, 4, Rand.) 15; (5 Rand.) 16; (6 Rand.) 18; (1 Leigh) 19; (2 Leigh) 21; (3 Leigh) 23; (3, 4 Leigh) 24; (4 Leigh) 26; (5 Leigh) 27; (6 Leigh) 29; (7 Leigh) 30; (8 Leigh) 31; (9 Leigh) 33; (10 Leigh) 34; (11 Leigh) 36; (11, 12 Leigh) 37; (1 Rob.) 39, 40; (2 Rob.) 40; (1 Gratt.) 42; (2 Gratt.) 44; (3 Gratt.) 46; (4 Gratt.) 47; (4, 5 Gratt.) 50; (5, 6 Gratt.) 52; (7 Gratt.) 54; (7, 8 Gratt.) 56; (9 Gratt.) 58; (9, 10 Gratt.) 60; (11 Gratt.) 62; (12 Gratt.) 65; (13 Gratt.) 67; (13 Gratt.) 70; (14 Gratt.) 73; (15 Gratt.) 76; (15, 16 Gratt.) 78; (16 Gratt.) 80.

WISCONSIN—(1 Pin.) 39; 40, 42, 44; (2 Pin., 1 Chand.) 52; (2, 3 Pin., 2, 3 Chand.) 54; (3 Pin.) 56; (1, 2) 60; (3) 62; (4) 65; (5) 68; (6) 70; (7) 73; (7, 8, 9, 10) 76; (10, 11, 12) 78; (13, 14) 80; (15, 16) 82.

AMERICAN DECISIONS.

VOL. LXXXII.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Adams v. Ross.....	<i>Estates</i>	1 Vroom, 505.....	237
Albany and Vermont R. R. Co. ad. People.	{ <i>Franchisees</i>	24 N. Y. 261.....	296
Alden v. N. Y. Central R. R. Co.		<i>Common carriers</i> ...26 N. Y. 102.....	401
Arnold v. Jones.....	<i>Common carriers</i> ...	26 Tex. 335.....	617
Baggs's Appeal.....	<i>Ex'rs and admin'rs</i> ..	43 Pa. St. 512.....	583
Banta v. Vreeland.....	<i>Mortgages</i>	2 McCarter, 103..	269
Barnes v. Martin.....	{ <i>Recaption— assault and bat'ry.</i> }	15 Wis. 240.....	670
Bartram's Estate.....		<i>Fraud. conveyances</i> ..	42 Pa. St. 330..... 517
Bassett v. Salisbury Mfg. Co.....	<i>Watercourses</i>	43 N. H. 569.....	179
Beal v. Park Fire Insurance Co.	<i>Insurance</i>	16 Wis. 241.....	719
Bevis v. Landis.....	<i>Executions</i>	6 Jones Eq. 312..	418
Bissell v. N. Y. Central R. R. Co.	<i>Common carriers</i> ...	25 N. Y. 442.....	369
Blankenship v. Douglas.....	<i>Judgments</i>	26 Tex. 225.....	608
Blockley v. Fowler.....	{ <i>Mortgages— ejectment.</i> }	21 Cal. 326.....	747
Bomberger v. Turner.....		<i>Equity</i>	13 Ohio St. 263.... 438
Booge v. Pacific Railroad.....	<i>Master and servant</i> ..	33 Mo. 212.....	160
Brawn v. Keller.....	<i>Sales</i>	43 Pa. St. 104....	554
Brimhall v. Van Campen.....	<i>Subscriptions</i>	8 Minn. 13.....	118
Bruggerman v. Hoerr.....	<i>Fraud. conveyances</i> ..	7 Minn. 337.....	97
Buck v. Colbath.....	<i>Trespass</i>	7 Minn. 310.....	91
Burnham v. City of Fond du Lac.	<i>Attachment</i>	15 Wis. 193.....	668
Callen v. Ellison.....	<i>Jurisdiction</i>	13 Ohio St. 446....	448
Cameron v. Cameron.....	<i>Ex'rs and admin'rs</i> ..	15 Wis. 1.....	652
Casselman v. Packard.....	<i>Exemptions</i>	16 Wis. 114.....	710
Cecil v. Spurger.....	<i>Sales</i>	32 Mo. 462.....	140
Central Ohio R. R. Co. v. Lawrence.	<i>Animals</i>	13 Ohio St. 66....	434
Codington v. Mott.....	<i>Equity</i>	1 McCarter, 430..	258

NAME.	SUBJECT.	REPORT.	PAGE.
Colman v. Post.....	<i>Mortgages</i>	10 Mich. 422.....	49
Commonwealth ex rel. Johnson v. Halloway.	{ <i>Criminal law</i>	42 Pa. St. 446.....	526
Commonwealth ex rel. Langham- mer v. Halloway.		42 Pa. St. 446.....	526
Commonwealth Insurance Co. v. Berger and Buts.	{ <i>Insurance</i>	42 Pa. St. 285.....	504
Cressman's Appeal.....	<i>Trusts</i>	42 Pa. St. 147.....	498
Crouse v. Derbyshire.....	<i>Replevin</i>	10 Mich. 479.....	51
Crum v. Moore's Administrator...	<i>Arbitr'n and award</i> .	1 McCarter, 436..	262
Danbury v. Robinson.....	<i>Bona fide purch'ers</i> .	1 McCarter, 213..	246
Davis v. Pierce.....	<i>Constitutional law</i> ...	7 Minn. 13.....	66
Dubois v. Beaver.....	{ <i>Trespass— growing trees</i> .	{ 25 N. Y. 123.....	326
Dunlap v. Knapp.....			
Dutil v. Pacheco.....	<i>Highways</i>	14 Ohio St. 64.....	468
Dutil v. Pacheco.....	<i>Suretyship</i>	21 Cal. 438.....	749
Dutton v. Warschauer.....	<i>Mortgages—ejectm't</i> .	21 Cal. 609.....	765
Eadie v. Slimmon.....	<i>Duress</i>	26 N. Y. 9.....	395
Eastman v. Amoskeag Mfg. Co....	<i>Nuisance—ejectm't</i> .	44 N. H. 143.....	201
Einer v. Beste.....	{ <i>Assignments for benefit of creditors</i> .	{ 32 Mo. 240.....	129
Emerson v. Simpson.....			
English v. Beehle.....	<i>Estates on condition</i> .	43 N. H. 475.....	168
English v. Beehle.....	<i>Married women</i> ...	32 Mo. 186.....	126
Farmers' Loan and Trust Co. v. Commercial Bank of Racine.	{ <i>Mortgages—replevin</i> .	15 Wis. 424.....	689
Farrell's Adm'r v. Brennan's Adm'r.			
Farrell's Adm'r v. Brennan's Adm'r.	<i>Wills</i>	32 Mo. 328.....	137
Filbert v. Hoff.....	<i>Co-tenancy</i>	42 Pa. St. 97.....	493
Fogg v. Portsmouth Athenaeum...	<i>Newspapers</i>	44 N. H. 115.....	191
Friess v. Rider.....	<i>Contracts</i>	24 N. Y. 367.....	308
Frink v. Frink.....	<i>Records</i>	43 N. H. 508.....	172
Ganson v. Madigan.....	<i>Contracts</i>	15 Wis. 144.....	659
Garcia v. State.....	<i>Larceny</i>	26 Tex. 209.....	605
Garrett v. Dewart.....	<i>Judicial sales</i>	43 Pa. St. 342.....	570
Gillespie v. Torrance.....	<i>Sales</i>	25 N. Y. 306.....	355
Gordon v. Torrey.....	<i>Mechanics' liens</i> ...	2 McCarter, 112..	273
Graff's Ex'r v. Kelly's Ex'rs.....	<i>Vendor and vendee</i> .	43 Pa. St. 453.....	580
Green v. Harrison.....	<i>Master in chancery</i> ..	6 Jones Eq. 253..	415
Greenleaf v. Ludington.....	<i>Corporations</i>	15 Wis. 558.....	698
Griswold v. Haven.....	<i>Agency</i>	25 N. Y. 525.....	380
Gugins v. Van Gorder.....	<i>Vendor and vendee</i> .	10 Mich. 523.....	55
Hadley v. Clinton County Im- porting Co.	{ <i>Sales</i>	13 Ohio St. 502....	454
Halloway ada. Commonwealth ex rel. Johnson.			
Halloway ada. Commonwealth ex rel. Langhammer.	{ <i>Criminal law</i>	42 Pa. St. 446.....	526
Halloway ada. Commonwealth ex rel. Langhammer.	{ <i>Criminal law</i>	42 Pa. St. 446.....	526
Harrison v. Taylor.....	<i>Co-tenancy</i>	33 Mo. 211.....	159
Hartley ada. People.....	<i>Official bonds</i>	21 Cal. 585.....	758
Hayes v. People.....	<i>Bigamy</i>	25 N. Y. 390.....	364

NAME.	SUBJECT.	REPORT.	PAGE.
Heil v. Glanding.....	<i>Negligence</i>	42 Pa. St. 493.....	537
Henry v. Sheldon.....	<i>Exemptions</i>	35 Vt. 427.....	644
Hersey v. Board of Supervisors of Milwaukee County.	<i>Taxation</i>	16 Wis. 185.....	713
Hess's Appeal.....	<i>Wills</i>	43 Pa. St. 73.....	551
Hodgdon v. Libbey.....	<i>Parent and child</i>	44 N. H. 321.....	223
Hunt v. Bates.....	<i>Judgments</i>	7 R. I. 217.....	592
James v. Jacques.....	<i>Suretyship</i>	26 Tex. 320.....	613
Jesup v. City Bank of Racine.....	<i>Mortgages</i>	15 Wis. 604.....	703
Johnson v. Halloway.....	<i>Criminal law</i>	42 Pa. St. 446.....	526
Johnson v. Mahaffey.....	<i>Fixtures</i>	43 Pa. St. 308.....	568
Joyner v. Joyner.....	<i>Mar'ge and divorce</i>	6 Jones Eq. 322..	421
Keane v. Cannovan.....	<i>Ejectment—taxes</i>	21 Cal. 291.....	738
Kennedy v. Kennedy.....	<i>Equity</i>	43 Pa. St. 413.....	574
Kern v. Von Phul.....	<i>Neg. instruments</i>	7 Minn. 426.....	105
Kimball v. Kimball.....	<i>Mar'ge and divorce</i>	44 N. H. 122.....	194
Klopp v. Witmoyer.....	<i>Executions</i>	43 Pa. St. 219.....	561
Ladue v. Griffith.....	<i>Common carriers</i>	25 N. Y. 364.....	360
Langhammer v. Halloway.....	<i>Criminal law</i>	42 Pa. St. 446.....	526
Larkin v. County of Saginaw.....	<i>Corporations</i>	11 Mich. 88.....	63
Lazier v. Westcott.....	<i>Judgments</i>	26 N. Y. 146.....	404
Lewis v. Back.....	<i>Replevin</i>	7 Minn. 104.....	73
Libbey ada. State ex rel. Hodgdon.....	<i>Parent and child</i>	44 N. H. 321.....	223
Lowery v. Steward.....	<i>Equitable assignm'ts</i>	25 N. Y. 239.....	346
Lycoming Ins. Co. v. Schreffler.....	<i>Insurance</i>	42 Pa. St. 188.....	501
Lynd v. Picket.....	<i>Attachment—ex- emptions—process</i>	7 Minn. 184.....	79
Mackason's Appeal.....	<i>Fraud, conveyances</i>	42 Pa. St. 330.....	517
Mallory v. Leach.....	<i>Fraud</i>	35 Vt. 156.....	625
Marsh v. Marsh.....	<i>Mar'ge and divorce</i>	1 McCarter, 315..	251
McBain v. Austin.....	<i>Sales</i>	16 Wis. 87.....	705
McCarthy v. White.....	<i>Stat. of limitations</i>	21 Cal. 495.....	754
McDermott v. State.....	<i>Rape</i>	13 Ohio St. 332.....	444
McKowen v. McDonald.....	<i>Statute of frauds</i>	43 Pa. St. 441.....	576
Meads v. Merchants' B'k of Albany.....	<i>Banks and banking</i>	25 N. Y. 143.....	331
Mecklem v. Blake.....	<i>Covenants</i>	16 Wis. 102.....	707
Morgan v. Dodge.....	<i>Estates of decedents</i>	44 N. H. 255.....	213
Morris v. Patchin.....	<i>Authentication of instruments</i>	24 N. Y. 394.....	311
Mortland v. Smith.....	<i>Bonds</i>	32 Mo. 225.....	128
Moses v. Ela.....	<i>Neg. instruments</i>	43 N. H. 557.....	175
Mount v. Mount.....	<i>Mar'ge and divorce</i>	2 McCarter, 162..	276
Newman v. Landrine.....	<i>Costs</i>	1 McCarter, 291..	249
Nichols v. Lee.....	<i>Mortgages</i>	10 Mich. 526.....	57
North Pennsylvania Coal Co. v. } Snowden.	<i>Co-tenancy— mines and mining</i>	42 Pa. St. 468.....	530
Paul v. Fulton and Brotherton.....	<i>Trusts</i>	32 Mo. 110.....	125
Pennsylvania R. R. Co. v. Vandiver.....	<i>Railroads</i>	42 Pa. St. 365.....	520

NAME.	SUBJECT.	REPORT.	PAGE.
People <i>ads.</i> Hayes.....	<i>Bigamy</i>	25 N. Y. 390.....	364
People v. Albany <i>etc.</i> R. R. Co.....	<i>Franchises</i>	24 N. Y. 261.....	295
People v. Hartley.....	<i>Official bonds</i>	21 Cal. 585.....	758
Perkins v. New York Central R. R. Co. }	<i>Common carriers</i>	24 N. Y. 196.....	281
Phillips v. Allen.....	<i>Munic. corporations</i>	41 Pa. St. 481.....	496
Phillips v. Potter.....	<i>Fraud</i>	7 R. I. 289.....	598
Pierce v. Cloud.....	<i>Ways</i>	42 Pa. St. 102.....	496
Porter v. Henderson.....	<i>Slander</i>	11 Mich. 20.....	59
Powell v. Inman.....	<i>Bonds</i>	8 Jones L. 436....	426
Preston v. Bowers.....	<i>Enticement</i>	13 Ohio St. 1.....	430
Railey v. Porter.....	<i>Agency</i>	32 Mo. 471.....	174
Raisler v. Springer.....	<i>Trespass</i>	38 Ala. 703.....	736
Randall v. Roche.....	<i>Admiralty</i>	1 Vroom, 220.....	233
Redington v. Chase.....	<i>Co-tenancy</i>	44 N. H. 36.....	189
Riker v. Hooper.....	<i>Forfeitures— animals</i>	35 Vt. 457.....	646
Roberts v. Strang, Adrianco, & Co.....	<i>Partnership</i>	38 Ala. 566.....	729
Roberts v. Thompson.....	<i>Collateral securities</i>	14 Ohio St. 1.....	465
Rouse v. Whited.....	<i>Evidence</i>	25 N. Y. 170.....	337
Rubey v. Huntsman.....	<i>Taxation</i>	32 Mo. 501.....	143
Rutherford v. Newman.....	<i>Judgments</i>	8 Minn. 47.....	122
Ryan v. Fowler.....	<i>Master and servant</i>	24 N. Y. 410.....	315
Sallee v. Arnold.....	<i>Guardian and ward</i>	32 Mo. 532.....	144
Seamans v. Carter.....	<i>Judgm'ts—statutes</i>	15 Wis. 548.....	696
Shalter and Ebling's Appeal.....	<i>Ex'rs and admin'rs</i>	43 Pa. St. 83.....	551
Shepard v. Milwaukee Gas Light Co.....	<i>Gas companies</i>	15 Wis. 318.....	679
Skillman v. Skillman.....	<i>Husband and wife</i>	2 McCarter, 478..	279
Smith v. Wilcox.....	<i>Sunday laws</i>	24 N. Y. 353.....	302
State <i>ads.</i> Garcia.....	<i>Larceny</i>	26 Tex. 209.....	605
State <i>ads.</i> McDermott.....	<i>Rape</i>	13 Ohio St. 332....	444
State <i>ex rel.</i> Hodgdon v. Libbey.....	<i>Parent and child</i>	44 N. H. 321.....	223
State v. Wilson.....	<i>Statutes</i>	43 N. H. 415.....	163
Steman, Baker, & Co. v. Harri- son and Hooper. }	<i>Neg. instruments</i>	42 Pa. St. 49.....	491
Sturtevant v. Orser.....	<i>Sales</i>	24 N. Y. 538.....	321
Stewart v. Griffith.....	<i>Guardian and ward</i>	33 Mo. 13.....	148
Sweetzer v. Jones.....	<i>Mortgages—fix't res</i>	35 Vt. 317.....	639
Tier v. Lampeon.....	<i>Agency</i>	35 Vt. 179.....	634
Tillotson v. Millard.....	<i>Homesteads</i>	7 Minn. 513.....	112
Tompkins v. Dudley.....	<i>Contracts</i>	25 N. Y. 272.....	349
Totten v. Cole.....	<i>Animals</i>	33 Mo. 138.....	157
Tracy v. Atherton.....	<i>Ways</i>	35 Vt. 52.....	621
Trafford v. Hall.....	<i>Set-off</i>	7 R. I. 104.....	589
Travis v. Brown.....	<i>Evidence—writings</i>	43 Pa. St. 9.....	540
Turrell v. Morgan.....	<i>Neg. instruments</i>	7 Minn. 368.....	101
Tuttle v. Strout.....	<i>Constitutional law</i>	7 Minn. 465.....	108
Vanorden v. Johnson.....	<i>Mortgages</i>	1 McCarter, 376..	254

CASES REPORTED.

21

NAME.	SUBJECT.	REPORT.	PAGE.
Walker v. Walker.....	<i>Wills.</i>	14 Ohio St. 157.....	474
Warfield v. Campbell.....	{ <i>Attachment—</i> <i>attorneys.</i> }	{ 38 Ala. 527.....	724
Webster's Executors v. Newbold.	{ <i>Statute of limita-</i> <i>tions—trusts.</i> }	{ 41 Pa. St. 482.....	487
Wentworth v. Smith.....	<i>Negligence.</i>	44 N. H. 419.....	228
Willie v. Freeman.....	<i>Partnership.</i>	35 Vt. 44.....	619
Wilson ada. State.....	<i>Statutes.</i>	43 N. H. 415.....	163
Woodward v. Lamar.....	<i>Trade-marks.</i>	21 Cal. 448.....	751
Wright v. Moore.....	<i>Nuisance.</i>	38 Ala. 593.....	731
Wynkoop v. Wynkoop.....	<i>Estates of decedents.</i>	42 Pa. St. 293.....	506
Yealy v. Fink.....	<i>Office and officers.</i>	43 Pa. St. 212.....	556
Young v. Cleveland.....	{ <i>Executions—</i> <i>suretyship.</i> }	{ 33 Mo. 126.....	158

CASES CITED.

	PAGE		PAGE
Abbott v. Allen.....	708	Appleton v. Small.....	249
Abbott v. Gatch.....	613	Armour v. Michigan Cent. R. R. Co.....	395
Abbott v. Pearson.....	345	Armstrong v. Simonton.....	147
Ableman v. Booth.....	78	Arnold v. Delano.....	667
Able v. Miller.....	658	Arnold v. Illinois Cent. R. R. Co..	292
Abney v. Kingaland.....	736	Ash v. Putnam.....	324
Abram v. Cunningham.....	217	Ashkum v. Lake.....	764
Abrams v. Foshee.....	63	Ashley, Appellant, In re.....	165
Ackley v. Chamberlain.....	117, 712	Askew v. La Cygne Bank.....	136
Acton v. Blundell.....	187, 188	Aster v. Hoyt.....	770
Adams v. Broughton.....	594	Atkin v. Barwick.....	322, 323, 324, 325
Adams v. Hamell.....	121, 307	Atkins v. Sawyer.....	174
Adams v. Nichols.....	351, 352	Atlantic etc. R. R. Co. v. Camp- bell.....	213
Adams v. Wiggins Ferry Co.....	540	Attorney-General v. Birmingham & O. J. R. R.....	299
Adkins v. Herabey.....	343	Attorney-General v. Conklin.....	668
Agnew v. Fetterman.....	489	Attorney-General v. Railroad Com- panies.....	302
Aikin v. Western R. R. Co.....	685	Attorney-General v. West Wis- consin R'y Co.....	302
Ainsworth v. Backus.....	401	Attwood v. Friot.....	658
Alden v. N. Y. Cent. R. R. Co..	404	Atwill v. Miller.....	213
Alder v. Keighley.....	684	Auditor v. Woodruff.....	764
Alderson v. Temple.....	325	Austen v. Craven.....	390, 391, 393, 394
Alderson v. Waistell.....	674	Austin v. Burgess.....	698
Aldrich v. Howard.....	735	Austin v. Wilson.....	91
Aldrich v. Pelham.....	206	Ayer v. Duncan.....	428
Alexander v. Lydick.....	147	Babb v. Celmsen.....	555
Alexander v. Northern R'y Co..	291	Babbott v. Thomas.....	673
Alger v. Scott.....	349	Babcock v. Libbey.....	395
Allen v. Claybrook.....	128	Bailey v. Dilworth.....	269
Allen v. Culver.....	169	Baines v. Jevons.....	192
Allen v. Deming.....	121	Baker v. Baker.....	200
Allen v. Dundas.....	219	Baker v. Haines.....	547, 548
Allen v. Feland.....	676	Baker v. Mygatt.....	345
Allen v. Hopeon.....	750	Balch v. Shaw.....	173, 174
Allen v. Newberry.....	236	Baldwin v. Calkins.....	734
Allen v. Thompson.....	645	Baldwin v. Carter.....	665
Allens v. Andrews.....	216	Baldwin v. Hayden.....	674, 678
Allison v. Burns.....	580	Baldwin v. Johnson.....	774
American Fire Ins. Co. v. Prin- gle.....	274	Ballow v. Boland.....	349
Amis v. Kyle.....	121	Baltimore Annual Conference, Trustees of v. Schell.....	698
Amoskeag Mfg. Co. v. Goodale..	188	Baltimore, Mayor, etc. of, v. Root	669, 670
Anders v. Meredith.....	496	Baltimore and Ohio R. R. Co. v. Brady.....	291
Anderson v. Roberts.....	248		
Andre v. Bodman.....	613		
Andre v. Johnson.....	678		
Andrews v. Durant.....	350, 355		
Andrews v. Morse.....	728		
Annan v. Houck.....	592		
Anonymous..	169, 170, 171, 218, 250, 329, 330, 400, 599, 637		

	PAGE		PAGE
Bank v. Donaldson.....	343	Beck v. East River Ferry Co....	321
Banks v. Evans.....	156	Beeby v. Beeby.....	253
Bank of Australasia v. Harding..	413	Beekman v. Saratoga & S. R. R.	
Bank of Australasia v. Nias.....	408, 413	Co.....	374
Bank of Chenango v. Osgood.....	730	Beer v. Hooper.....	134
Bank of New York v. Bank of Ohio.....	336	Begg v. Begg.....	668
Bank of Pittsburgh v. Whitehead.....	465	Beldan v. Davies.....	601
Bank of Salina v. Babcock.....	336	Belger v. Dinamore.....	380
Barber v. Armstead.....	434	Bell v. Byerson.....	213, 634
Barber v. Rose.....	357	Belleville R. R. Co. v. Gregory..	110
Barbour v. Martin.....	344	Bellinger v. Kitts.....	309
Barclay's Appeal.....	536	Belote v. State.....	607
Barker v. Martyn.....	597	Belton v. Apperson.....	262
Barkley v. Rensselaer and Saratoga R. R. Co.....	638	Bement v. Smith.....	663
Barnard v. Gaslin.....	108	Bendall's Distributees v. Bendall's Adm'r.....	659
Barnes v. Company.....	172	Benedict v. Caffie.....	177
Barnes v. Dean.....	676	Benedict v. Harlan.....	727
Barney v. Smith.....	345	Benham v. Purdy.....	658
Baron v. Brummer.....	401	Benham v. Rowe.....	139, 749
Barque v. Chusan.....	235	Bennett v. Fifield.....	597
Barr v. Reitz.....	556	Bennett v. Ford.....	213
Barrett v. Singer Mfg. Co.....	321	Bennett's Branch Improvement Co.'s Appeal.....	568
Barrie v. Dana.....	314	Bentley v. Dorcas.....	442
Barron v. Alexander.....	141	Benton v. Chicago etc. R. R. Co.	294
Barrow v. Landry.....	188, 540	Berg v. Chicago etc. R. R. Co...	294
Barrows v. Knight.....	753	Bergen v. Bennett.....	748
Barry v. Brune.....	401	Berly v. Taylor.....	324, 325, 347
Barry v. Equitable Life Assurance Society.....	401	Berthold v. Holman.....	78
Barry v. Ransom.....	342	Beawick v. Oundon Hill.....	211
Bartlet v. King.....	165	Bettison, In re.....	512, 516
Bartlett v. Board of Education..	763	Bevan v. Cullen.....	490
Bartlett v. Crozier.....	470, 471	Biddle v. Hestonville etc. R'y Co.	293
Bartlett v. Hoyt.....	205	Bieber's Appeal.....	219
Bartlett v. Knight.....	414	Bigelow v. Bigelow.....	218
Bartlett v. Wood.....	643	Binns v. Mount.....	251
Barton v. Baker.....	176	Bird v. Lisbros.....	746
Barton v. Drake.....	111	Birdzell v. Birdsall.....	200
Barton v. Kane.....	668	Birkbeck v. Hoboken F. R. Co..	234
Bass v. Chicago etc. R'y Co.....	526	Bischoff v. Wethered.....	412
Bassett v. Salisbury Mfg. Co.....	188, 205, 212	Bishop v. Bishop.....	570
Basten v. Butter.....	357	Bishop of Ely v. Kenrick.....	532
Bates v. Chicago etc. R'y.....	670	Bissell v. Bissell.....	369
Bataford v. Every.....	307	Bissell v. Briggs.....	412, 414
Batterman v. Pierce.....	357, 358	Bissell v. N. Y. Central R. R. Co.....	288, 291
Baugh v. Baugh.....	199	Black v. Carrollton R. R. Co.....	525, 540
Baugh v. Nelson.....	698	Black v. Goodrich Transp. Co....	292
Bauleo v. New York etc. R. R. Co.....	321	Blackborough v. Davis.....	216, 217, 218
Bauman v. Bauman.....	254	Blackburn v. Walpole.....	165
Baxley v. Linah.....	78	Blackwell v. Blackwell.....	262
Beals v. Hale.....	164	Blades v. Higgs.....	677, 678
Bean v. Parker.....	760	Blair v. Erie R'y Co.....	290, 292, 380
Bean v. Smith.....	248	Blair v. Ward.....	256
Beard v. Kirk.....	638	Blake v. Jerome.....	676
Beardsley v. Maynard.....	61	Blake v. Midland R'y Co.....	283
Beares v. Copley.....	343	Blanchard v. Brooks.....	239
Beatie v. Butler.....	613	Blanchard v. Trim.....	326
Beckmann v. Haan.....	710	Blann v. Crocheron.....	597, 737
		Bloom v. Burdick.....	554
		Bloomer v. Henderson.....	776
		Blossom v. Dodd.....	379

	PAGE		PAGE
Blossom v. Griffin.....	302, 303, 668	Brigham v. Smith.....	625
Blossome v. Williams.....	304	Bright v. Eynon.....	600
Blunt v. Aikin.....	211	Brill v. Tuttle.....	349
Blunt v. Walker.....	775	Brinkley v. Brinkley.....	411
Blydenburgh v. Welsh.....	464	Bristol etc. R'y Co. v. Collins...	292
Blystone v. Burgett.....	121	Britton v. Turner.....	357, 358
Board of Supervisors v. Coffin- bury.....	761	Broadstreet v. Broadstreet.....	200
Board of Supervisors etc. v. Hee- nan.....	109	Brocas v. Brocas.....	197
Boardman v. Woodman.....	188	Brookover v. Hurst.....	428
Boetcher v. Staples.....	91	Brooks v. Buffalo & N. F. R. R. Co.....	538
Bogert v. City of Indianapolis.....	511, 512, 514, 516	Broome v. Wooton.....	593, 594, 596, 597
Bolt v. Keyhoe.....	401	Brown v. Agnew.....	490
Bond v. City of Kenosha.....	719	Brown v. Blydenburgh.....	59
Bond v. Farnham.....	176, 177	Brown v. Chicago etc. R'y.....	688
Booster v. Rogers.....	465	Brown v. Gray.....	141, 465
Bookstaver v. Jayne.....	360	Brown v. Illius.....	613
Boon v. Bowers.....	153	Brown v. Leavitt.....	337
Boone Co. v. Jones.....	764	Brown v. Montgomery.....	634
Boorman v. Kilgore.....	580	Brown v. Mudgett.....	345
Boorman v. Schober.....	698	Brown v. Munger.....	103
Booth v. Spayten Duyvil R. M. Co.....	355	Brown v. Pierce.....	400
Boring v. Williams.....	760, 762	Brown v. Swineford.....	678
Born v. Shaw.....	556	Browne v. Philadelphia Bank...	108
Borup v. Minerger.....	106	Bruce v. Bonney.....	59
Boston Mills v. Hull.....	360	Bruce v. Schuyler.....	167, 698
Boulton v. Crowther.....	557, 559	Brummer v. Cohen.....	401
Bowen v. Johnson.....	222	Brunnett v. Clark.....	308
Bowen v. Lease.....	164, 165	Bryan v. Miller.....	175
Bowen v. N. Y. Cent. & H. R. Co.	371	Bryan v. Ramires.....	758
Bowen v. Slaughter.....	668	Bryant v. Allen.....	214
Bowker v. Johnson.....	51	Brydon v. Stewart.....	317
Bowler v. Eldredge.....	676	Bryson v. Bryson.....	153
Bowman v. Manter.....	59	Buchan v. Sumner.....	612
Bowser's Appeal.....	583	Buck v. Burk.....	309
Boyd v. Barclay.....	428	Buck v. Colbath.....	73, 95
Boyd v. McCombs.....	573	Buckland v. Johnson.....	595
Boyce v. Fitzpatrick.....	321	Buckley v. Corse.....	259
Boykin v. State.....	760	Buckley v. Garrett.....	503
Boynton v. Page.....	305	Buffalo, City of, v. Holloway...	473
Bradford v. Abent.....	200	Buffham v. City of Racine.....	670
Bradford v. Beyer.....	428	Bullard v. Harrison.....	622, 623, 624
Bradshaw's Case.....	709	Bumpass v. Webb.....	345
Bradstreet v. Clark.....	170	Bunn v. Ahl.....	634
Brady v. Little.....	174	Burch v. Smith.....	634
Branch v. Doane.....	212	Burden v. Stein.....	735
Braswell v. American L. Ins. Co.	638	Burke v. South Eastern R'y Co.	291
Brauns v. City of Green Bay...	719	Burkholder v. Stahl.....	540
Brazier v. Analey.....	667	Burkholder's Ex'r v. Plank.....	550
Breece v. U. S. Tel. Co.....	379	Burleigh v. Coffin.....	51
Brent v. Haddon.....	211	Burn v. Bletcher.....	412, 413
Bridges v. Bridges.....	128	Burnham v. Webster.....	412, 414
Bridgewater Academy v. Gilbert.	121	Burnley v. Duke.....	218
Brice v. Randall.....	624	Burns v. Clarion Co.....	588
Brick v. Green.....	472	Burris v. Johnson.....	676
Brick Presbyterian Church, In re.	513	Burrough v. Moss.....	591
Brickner v. New York Central R. R. Co.....	321	Burroughs v. State Mut. Life Assurance Co.....	401
Briggs v. Dorr.....	264	Burwell v. Hobson.....	188
Briggs v. Merrill.....	428	Burwell v. Tullis.....	118
		Butler v. Lee.....	121, 307
		Butler v. Lewis.....	314

	PAGE		PAGE
Butler v. Moore.....	429	Chambers v. State.....	343
Butler v. Steamboat Arrow.....	344	Chandler v. Fulton.....	326
Buttick v. Allen.....	411, 412, 414	Chapin v. School District.....	169
Bussell v. Laconia Mfg. Co.....	320	Chapin v. Sullivan R. R.....	438
Byington v. Bookwalter.....	123	Chapman v. Chapman.....	254
		Chapman v. Erie Railway Co....	296
Cabiness v. Martin.....	343	Chapman v. New Haven R. R. Co.	540
Cable v. Dakin.....	89	Chapman v. Searle.....	393
Cadogan v. Kennett.....	599	Chapman v. Thumblethorp.....	676
Caldwell v. N. J. Steamboat Co.	404	Charles v. Haskins.....	763
Calhoun v. Calhoun.....	128	Charles v. Lamberson.....	117
Call v. Gray.....	556	Chase v. Am. Steamboat Co.....	294
Callan v. Gaylord.....	547	Chase v. Hogan.....	355
Calvert v. Roche.....	613	Chase v. Lockerman.....	659
Cameron v. State.....	369	Chase v. Silverstone.....	188
Camidge v. Allenley.....	178	Chase v. Washburn.....	147
Campbell v. Cooper.....	226	Chataque Co. Bank v. Risley..	123
Campbell v. Fleming.....	633	Chedington's Case.....	242
Campbell v. Lowe.....	616	Cheesebrough v. Willard.....	256
Campbell v. Merchants' etc. Ins.		Chemung Canal Bank v. Bradner.	395
Co.....	722	Chenery v. Palmer.....	556
Campbell, Goods of.....	218	Cheriot v. Foussat.....	412
Candee v. Western U. Tel. Co.	688	Chester v. Dickerson.....	395
Capehart v. Van Campen.....	121	Chew v. Mather.....	581
Capling v. Herman.....	411	Chicago, City of, v. Gage.....	763
Carew's Case.....	218	Chicago etc. R. R. Co. v. Casey..	293
Carey v. Nicholson.....	343	Chicago etc. R. R. Co. v. Dewey.	540
Cargile v. Fernald.....	155	Chicago etc. R. R. Co. v. George.	213,
Carleton v. Redington.....	208		613
Carlisle v. Hill.....	176	Chicago etc. R. R. Co. v. Michie.	293
Carman v. Pultz.....	347	Chicago etc. R. R. Co. v. Parks.	525
Carney v. LaCrosse & M. R. R.		Chicago etc. v. Patchin.....	540
Co.....	704	Chicago etc. R. R. Co. v. Smith.	296
Carow v. Mowatt.....	218	Chichester v. Cande.....	174
Carpenter v. McClure.....	429	Chichester v. Lethbridge.....	622
Carpentier v. Mendenhall.....	160	Child v. Homer.....	61
Carpentier v. Williamson.....	775	Chilton v. London and Craydon	
Carr v. Northern Liberties.....	64	R'y Co.....	523
Carroll v. Ballance.....	775	Christian v. Gregg.....	404
Carroll v. State.....	675, 737	Christy v. Smith.....	231
Carroll v. Staten Island R. R. Co.	307,	Church v. Church.....	515
	404	Church v. Gilman.....	94
Carrollton Bank v. Tayleur.....	492	Church v. Hubbard.....	412
Carter v. Bennett.....	728	Church v. Muir.....	428
Carter v. Commonwealth.....	153	Cincinnati etc. R. R. Co. v. Pon-	
Carter v. Tincum Fishing Co....	498	tius.....	292
Cartwright v. Pultney.....	532	Cincinnati H. & D. R. R. Co. v.	
Carver v. Tracy.....	340, 343	Waterson.....	436, 438
Cary v. Gresman.....	358	Citizens Bank of Baltimore v.	
Case v. Woolley.....	236	Howell.....	108
Castor and Aicles, In re.....	224	City Council v. Benjamin.....	307
Castrique v. Imrie.....	413	City Council v. Gilmer.....	473
Catlin v. Bennett.....	513	City of Buffalo v. Holloway.....	473
Catskill Bank v. Messenger.....	730	City of Chicago v. Gage.....	763
Cecil's Adm'r v. Spurger.....	604	City of Cincinnati v. Evans.....	682, 686
Central Railroad v. Combs.....	292	City of Sacramento v. Dunlap..	759
Central R. R. Co. v. Mitchell....	294	City of St. Paul v. Colter.....	111
Chamberlain v. Brewer.....	763	City of St. Paul v. Seitz.....	473
Chamberlain v. Smith.....	676	City of Tallahassee v. Fortune ..	473
Chamberlain v. Stewart.....	359	City of Warrensburg v. Simpson	157
Chambers v. Bedell.....	676	Clafin v. Lenheim.....	638
Chambers v. Miller.....	678	Claggett v. Sims.....	173
Chambers v. Perry.....	147	Clapp v. Rice.....	108

	PAGE		PAGE
Clark v. Baker	768	Commonwealth v. Kennard.....	674
Clark v. Bartlett	327	Commonwealth v. Keyes	343
Clark v. Beach	770	Commonwealth v. Kinison.....	606
Clark v. Cogge.....	621, 622	Commonwealth v. Laub.....	760, 763
Clark v. Depew	315	Commonwealth v. Molts.....	491
Clark v. Fletcher	344	Commonwealth v. Smith	542
Clark v. Hougham	490	Commonwealth v. Stub	554
Clark v. LeCren	631	Commonwealth v. Wilbank.....	225
Clark v. Lynch	326	Commonwealth v. Young	570
Clark v. New England etc. Ins. Co.....	503, 505	Commonwealth Ins.Co. v. Sennett	502
Clark v. Smith.....	343	Compton v. Barnes.....	659
Clark v. Union Mutual Fire Ins. Co.....	722, 723	Congelton v. Pattison.....	169
Clark v. Whitaker	701	Conkey v. Milwaukee & St. P. R'y Co.....	363
Clark v. Wyatt.....	550	Connolly v. Poillon.....	321
Clarke v. Rochester and Syracuse R. R. Co.....	371	Cook v. Oastner.....	634
Claxton v. Swift.....	593	Cook v. Johnson.....	520
Clayton v. Liverman.....	476, 480	Cook v. State.....	343
Clayton v. Wardell	367	Coolidge v. Payson.....	492
Cleason v. Shaw	761	Cooper v. Berry.....	618, 667
Clemens v. Clemens.....	429	Cooper v. Maupin.....	625
Cleveland etc. R. R. Co. v. Our- ran	292	Cooper v. Reaney.....	120
Cleveland C. & C. R. R. Co. v. Elliott	436, 438	Cooper v. Shepherd.....	586
Clifton v. Murray	551	Coppers v. St. Patrick's Cathedral	512,
Clinton v. Hope Ins. Co.....	355		513
Clow v. Woods	555	Corbet v. Barnes.....	597
Coats v. Darby.....	701, 702	Corbett v. Brown.....	463
Cobb v. Rye	170	Corbit v. Smith.....	51
Cochran v. Van Surlay.....	153	Corfield v. Coryell.....	71
Cochran v. Almack	444	Cornelius v. Molloy.....	464
Cockburn v. Ashland Lumber Co.	688	Cornwall v. Richardson.....	61
Cockshott v. Bennett	600	Corwith v. State Bank of Illinois.	704,
Coe v. Cassidy	360		705
Coe v. C. P. etc. R. R. Co.....	301	Coster v. Brown.....	757
Coffin v. Cottle	216	Cottle, Appellant.....	216
Coffman v. Hampton	667	Cottrell v. Varnum	728
Coggs v. Bernard	284	Couch v. Mills	730
Coggswell v. Stout	257	Coughlin v. Ryan.....	147
Cohens v. Virginia.....	449	Coughran v. Gutcheams.....	174
Coit v. Haven	454	Countryman v. Lighthill.....	331
Colbath v. Buch	94, 95	County of De Soto v. Dickson...	763
Cole v. Goodwin.....	284	Cowan v. Braidwood.....	412
Cole v. Sproul	634	Cowan v. Cowan.....	200
Coleman v. Ballandi	111	Cowell v. Thayer.....	735
Coleman v. Riches	388	Cowles v. Garrett.....	665
Collett v. Collett	277	Cowley v. Mayor etc. of Sunder- land.....	523
Collett v. R'y Co.....	293	Cox v. Cox.....	580
Collins v. Evans	464	Cox v. Great Western R'y Co. ..	294
Collins v. Dorchester	206, 232	Coxe v. Smith	532
Collins v. Johnson	343	Coyle v. Western R. R.....	363
Collins v. Prentice	623, 624	Craft v. Snook's Ex'rs.....	659
Collyer v. Collins	359	Cragin v. N. Y. Cent. R. R. Co.	290,
Comer v. Carpenter	429		380
Commercial Bank v. Kortright..	703	Craig v. Bolton.....	250
Commonwealth v. Cooley.....	164, 165	Craig v. First Presbyterian Ch...	511,
Commonwealth v. Cromley	165		515
Commonwealth v. Drow	675	Craker v. Chicago etc. R'y Co...	528
Commonwealth v. Eastman.....	213	Cranwell v. Ship Foodiek.....	618
Commonwealth v. Holmes	761	Cravens v. Faulconer.....	187, 139
		Crawford v. Clute.....	728
		Crawley v. Lidgest.....	593
		Creamer v. Perry.....	176

	PAGE		PAGE
Creath v. Brent.....	217	De Graff v. N. Y. etc. R. R. Co..	321
Creath's Adm'r v. Sims	429	Delacroix v. Bulkley.....	309
Credit v. Brown.....	341	Delahoussaye v. Judice.....	188
Creed v. Pennsylvania R. R. Co.	293	Delano v. Rawson.....	359
Crittenden v. Wilson.....	213	Delano v. Wilde	705
Crocker v. Crane.....	106	Delaware, L., & W. R. R. Co. v.	
Crommellin v. Cox.....	213	Bowns.....	355
Crommelin v. Thies.....	613	Delespine v. Campbell.....	613
Crookshank v. Burrell.....	662	Demeritt v. Miles.....	428
Crosby v. Leary.....	343	Deming v. Foster.....	205
Cross v. Carson.....	172	Dennison v. Georing.....	500
Crowhurst v. Am. Burial Board..	331	Denny v. Denny.....	200
Cruty v. Erie R'y Co.....	321	Denny v. Palmer.....	176
Cubitt v. Porter.....	330	Deppe v. Chicago etc. R. R. Co..	294
Cummings v. Banks.....	409	Depue v. Place.....	547
Cunningham v. Gray.....	153	Derrickson v. Cody.....	489
Cunningham v. Hawkins.....	757	Des Arts v. Leggett.....	663
Cunningham v. Reardon.....	512	De Soto, County of, v. Dickson..	763
Curtice v. Thompson.....	208, 211	Detrick v. Migatt.....	658
Curtis v. Rochester and Syracuse		Detroit v. Blakeley.....	64
R. R. Co.....	403	Dewint v. Wiltse.....	685
Currier v. Boston and Maine R. R.	727	Dexter v. Allen.....	165
Cutter v. Powell.....	161	Dexter v. Norton.....	355
Cutts v. Haskins.....	216	Dickens v. Carr.....	155
		Dickson v. Desire's Adm'r	710
Dabney v. Stevens.....	395	Diehl v. Page.....	774
Dalrymple v. Dalrymple.....	367	Digby v. Wray.....	219
Daniels v. Willard.....	134	Dike v. Lewis.....	744
Dair v. United States.....	763	Dillon v. Brown.....	621
Dakins v. Seaman.....	164	Dinsmore v. Racine etc. R. R..	695
D'Aranda v. Houston.....	602	Diversity v. Kellogg.....	638
Darby v. Ouseley.....	345	Dodd v. Brott.....	729
Dargan v. Mayor etc.....	64	Dodd v. McCraw.....	54
Darlington v. Painter.....	734	Dodds v. Combs.....	175
Davenport v. Ludlow.....	727	Dodge v. Lambert.....	305
Davidson v. Johannot.....	153	Doe v. Douglass.....	153
Davies v. Fairborn.....	165	Doe v. Martin.....	242
Daviss v. Flewellen.....	345	Doe ex dem. Hutchinson v. Horn	573
Davis v. Fish.....	434	Doe ex dem. Roberts v. Roberts.	428
Davis v. Forrest.....	345	Donohoe v. Veal.....	143
Davis v. Haydon.....	764	Doonan v. Mitchell.....	343
Davis v. McNalley.....	634	Dopp v. Albee.....	698
Davis v. Mitchell.....	429	Doran v. East River Ferry Co..	295
Davis v. Newkirk.....	700, 701	Dore v. Dawson.....	726
Davis v. Perley.....	747	Dorlan v. Sammis.....	601
Davis v. Rhame.....	147	Dorlan v. Douglass.....	340, 343
Davis v. State.....	110, 167	Dorr v. N. J. Steam Nav. Co....	371
Davis v. Talcott.....	685	Dorr's Case.....	153
Davis v. Whitridge.....	674	Dorsey v. Smyth.....	762
Davoue v. Fanning.....	749	Doughty v. Bowman.....	169
Dawson v. Miller.....	167	Douglas v. Forrest.....	413
Day, Ex parte.....	480	Douglass v. Yallop.....	174
Day v. Alverson.....	746	Dow v. Jewell.....	262
Day v. Lowrie.....	581	Downer v. Button.....	205
Dean v. Leonard.....	91	Downey v. Dillon.....	63
Dean v. Newhall.....	730	Downey v. Garard.....	489
Dearborn v. Cross.....	309	Dows v. Congdon.....	358
Deare v. Carr.....	272	Drake v. Gores.....	665
Dearmon v. Blackburn.....	54	Dreyer v. Ming.....	700
De Brimont v. Penniman.....	412	Dubois v. McLean.....	154
Decamp v. Hewitt.....	162	Dubois v. Trant.....	216
De Chastellux v. Fairchild.....	155	Dubois's Appeal.....	729
De Cose Brissac v. Rathbone..	413	Dudley v. Bergen.....	273

CASES CITED

29

	PAGE		PAGE
Dadley v. Butler.....	173	Edmond v. Van Benschoten	309
Duff v. Alleghany Valley R. R. Co.....	293	Estate of Parker.....	588
Dufour v. Pereira.....	477	Evans v. Dravo.....	429
Dugan v. Gittings.....	167	Evans v. Edmonds.....	602
Dumper v. Syms.....	170	Evans v. Ellis.....	397
Dumpror's Case.....	170, 171	Evans v. Scott.....	556
Duncan v. Berlin.....	349	Evans v. Smith.....	62, 213, 475
Duncan v. Matney.....	506	Evans v. Thomson.....	309
Dunham v. Bower.....	359	Evansville etc. R. R. Co. v. Baum.	526
Dunkin v. Vandenbergh.....	728	Everton v. Everton.....	421
Dunlap v. Bournonville.....	556	Ewer v. Hobbs.....	769
Dupree v. McDonald.....	664	Exchange Bank v. Monteath....	395
Durand v. Durand.....	369	Exchange Bank of St. Louis v. Rice.....	493
Durant v. Durant.....	277	Eyer v. Eyer.....	428
Durell v. Wendell.....	730		
Durell v. Hayward.....	512	Fair v. Stevenot.....	776
Durian v. Central Verein of the Hermanns Soehune.....	401	Farmers' Bank v. Whitehill.....	545, 546, 547, 548
Durst v. Burton.....	395	Farmers' Loan etc. Co. v. Cary..	695
Dutcher v. Culver.....	118	Farmers' Loan & T. Co. v. Com- mercial Bank.....	668, 695
Dutton v. Kelsey.....	764	Farmers' Loan etc. Co. v. Fisher.	695
Dutton v. Taylor.....	621, 622, 623, 625	Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank....	381, 384, 385, 386, 387
Duval v. Farmers' Bank of Mary- land.....	176	Farmers' and M. Bank v. Ege ...	573
Dyckman v. Valiente.....	302	Farmers' and Mechanics' Bank of Kent Co. v. Butchers' and Dro- vers' Bank	333, 334, 335, 336
Dyer v. Homer.....	429	Farmington Academy v. Allen ..	121
Dygert v. Schenck.....	735	Farr v. Brackett.....	165
Dyott v. Dyott.....	250	Faulkner v. Erie R'y Co.....	321
		Fay v. Wenzell.....	173, 174
Eads v. Brasleton.....	747	Felch v. Bugbee.....	135
Earl of Darlington v. Pulteney..	477	Fell v. Muller.....	667
Earl v. De Hart.....	188	Fellows v. Hartford and New York Steamboat Co.....	638
Earl of Portsmouth v. Countess of Portsmouth.....	253	Fenner v. Buffalo & S. L. R. R. Co.....	363
Early v. Garrett.....	462	Fennings v. Grenville.....	190
Eason v. Petway.....	419	Fenton v. Ham.....	423
Easterby v. Sampson.....	169	Fenton v. Read.....	367
Eastern Counties R'y Co. v. Broom.....	523	Ferguson v. Ferguson.....	277
Eaton v. Delaware etc. R. R. Co.	293	Ferguson v. Harwood.....	313
Eddowes v. Hopkins.....	174	Ferguson v. Kumler.....	101, 117, 118
Edgar v. Greer.....	167	Ferguson v. Mahon.....	408, 413
Edinboro' Academy v. Robinson.	121	Field v. Mayor of N. Y.....	349
Edwards v. Derricksen.....	274	Findley v. Cooley.....	429
Edwards v. Elliott.....	236	Finley v. Quirk.....	121
Edwards v. Harben.....	555	Finney v. Ackerman.....	693
Einer v. Deynoodt.....	136	Finney v. Callendar.....	121
Elliott v. Brown.....	674	Finney v. Cochran.....	489
Elliott v. Powell.....	54	Farmers' Benev. Ass'n v. Louns- bury.....	110
Ellis v. Ellis.....	198	First Nat. Bank v. Leach.....	336
Ellis v. Matthews.....	634	First Nat. Bank v. McAllister ..	56
Ellis v. Messervie.....	397	First Nat. Bank v. National Ma- rine Bank.....	106
Ellis v. Paige.....	165	Fisher v. Bishop.....	400
Ellison v. Daniels.....	768	Fisher v. State.....	607
Ellison v. Ellison.....	500	Fisk v. Tank.....	139
Ellsworth v. Hall.....	59	Fitzer v. Fitzer.....	519
Emery v. Baltz.....	359		
Emery v. Webster.....	665		
Ennis v. Smith.....	406		
Eric v. Knapp.....	669		
Eric v. Schwingle.....	64		
Erwin v. Olmstead.....	330		

	PAGE		PAGE
Fitzgerald v. Forristal.....	429	Gardner v. New Haven etc. R.	
Fitzherbert v. Mather.....	383	R. Co.....	293
Flagg v. Mann.....	774	Garey v. Nicholson.....	339, 340, 343
Fleming v. Gilbert.....	309	Garner v. Marshall.....	766
Fletcher v. Austin.....	760, 763	Garnett v. Garnett.....	200
Fletcher v. Jackson.....	139	Garrett v. Jackson.....	497
Fletcher v. Peck.....	248	Garrett and Martin's Appeal....	110
Fletcher v. Tayleur.....	683, 684	Garrett v. Patchin.....	645
Flick v. Wetherbee.....	688	Garside v. Proprietors of Trent	
Flinn v. Philadelphia etc. R. R.		and Mersey Nav. Co.....	362
Co.....	292	Garwood v. Eldridge.....	58
Flint River Steamboat Co. v.		Garwood v. Hastings.....	747
Roberts.....	536	Gaskill v. Sine.....	257
Fogarty v. Finlay.....	108	Gasque v. Moody.....	219
Fogarty v. Sawyer.....	769	Gausson v. United States.....	761
Folsom v. Carli.....	113, 114	Gauthier v. Blight.....	412
Forrest v. Forrest.....	340, 345	Gebhart v. Adams.....	491
Forsythe v. Beveridge.....	729	Genesee Bank v. Patchin Bank..	386
Fortune v. St. Louis.....	669	Gerriah v. Clough.....	188
Forward v. Pittard.....	363	Gibson v. Gibson.....	678
Foster v. Charles.....	463	Gibson v. Erie R'y Co.....	321
Foster v. Commonwealth.....	554	Gibson v. Lacy.....	345
Foster v. Gile.....	401	Giddings v. Cox.....	165
Foster's Case.....	164	Gifford v. Ford.....	429
Fowler v. Butterly.....	401	Gilbert v. Bussard.....	510
Fowler v. Whiteman.....	451	Gilchrist v. Bale.....	434
Fox v. Harding.....	683	Gildersleeve v. Maloney.....	345
Foye v. Leighton.....	205	Giles v. Simonds.....	676
Fraler v. Sears Union Water Co.	188	Giles v. Taff Yale R'y Co.....	524
Frank v. State.....	344	Gilkynson v. Larue.....	490
Franks v. Mut. L. Ins. Co. of N.		Gillenwater v. Madison and In-	
Y.....	401	dianapolis R. R. Co.....	284, 290
Fraser v. Williams.....	91	Gillman v. Henry.....	695, 696
Fraser v. Thatcher.....	612	Gilly v. Henry.....	667
Freeholders of Middlesex v.		Gilman v. Eastern R. R. Co.....	321
Thomas.....	272	Gilman v. Hunnewell.....	753
Freeman v. Howe.....	74, 75, 76, 78, 93,	Gilman v. Williams.....	78, 94
	94, 95	Gilmore v. Miami Exporting Co..	443
Freke v. Thomas.....	218	Glinister v. Andley.....	709
French v. Hayes.....	668	Globe, The.....	235
French v. Martin.....	498	Gloudy v. Gebhart.....	428
French v. Shoemaker.....	400	Goble v. Dillon.....	91
Freund v. Importers' & T. Bank.	336	Goddard v. Boston.....	165
Frisboe's Appeal.....	536	Goddefroy v. Caldwell.....	59
Fullam v. Stearns.....	643	Godfrey v. Saunders.....	490
Fuller v. Duren.....	707	Goehegan v. Reed.....	490
Fuller v. Talbot.....	403	Goff v. Great Northern R'y Co..	524
Fullerton v. McArthur.....	153	Golder v. Ogden.....	667
Fulton v. Hood.....	400, 546, 549, 550	Goldson v. Buck.....	165
Fultz v. State.....	433	Goodenow v. Buttrick.....	165
Furbush v. Greene.....	568	Goodenow v. Ever.....	767, 775
		Goodhue v. Clark.....	222
Gadds v. Lord.....	343	Goodpaster v. Voris.....	139, 592
Gahagan v. Boston & L. R. R.		Goodrich v. Pendleton.....	250
Co.....	232, 540	Goodrich v. Trent.....	401
Gale v. Mensing.....	58	Goodrum v. Carroll.....	761
Galena etc. R. R. Co. v. Fay...	290	Goods of Hapier.....	216
Gallagher v. Nichols.....	349	Goods of Campbell.....	218
Gallin v. London etc. R'y Co...	291	Goods of Jenkins.....	216
Gambril v. Doe ex dem. Rose...	143	Goods of Metcalfe.....	218
Ganson v. Madigan.....	661, 667, 696	Goods of Newton.....	218
Gardiner v. State.....	607	Goodyear v. De la Vergne....	343, 345
Gardner v. Newburgh.....	213	Gordon v. Ellison.....	251

	PAGE		PAGE
Gorham v. Lockett	165	Hadley v. Baxendale ...	683, 684, 687
Gorman v. Pacific R. R.	438	Haffley v. Maier	768
Gormley v. Potter	444	Hagan v. Providence etc. R. R.	
Goshen v. Stonington	117	Co.	525, 540
Gould v. Lamb	243	Haile v. Hill	345
Gould v. New York Mut. Fire		Hair v. Little	737
Ins. Co.	634	Haisten v. Hixen	343
Governor and Company of British		Hall v. Buffalo	349
Cast Plate Manufacturers v.		Hall v. Davis	206, 665
Meredith	557	Hall v. Delaplaine	444
Grace v. Wade	612, 613	Hall v. McLeod	498, 625
Gradin v. St. Paul etc. R. R. Co.	294	Hall v. North Eastern R'y Co.	291, 292
Gradle v. Hoffman	764	Hall v. Richardson	326
Graham v. Reynolds	747	Halley v. Oldham	613
Grandison v. Dover	219	Halsey v. Carter	357, 358
Grandons v. Lovdal	331	Ham v. Ayers	214
Grant v. Grant	197, 198	Hamilton v. Scull's Adm'r	423
Grant v. Lewis	556	Hamilton v. St. Louis	153
Grant v. Morse	347	Hamilton v. Summers	213
Grant v. Norway	387	Hammer v. Shoenfelder	688
Grattan v. Metropolitan L. I. Co.	343	Hammond v. Davenport	454
Grattan v. Wiggins	757, 758	Hammond v. Railroad Co.	293
Gray v. Rich	634	Hammond v. Woodman	550
Graybrook v. Fox	217, 219	Hanford v. Paine	136
Green v. Borough of Reading ..	558	Hanly v. Morse	774
Green v. Ferguson	359	Hapgood v. Houghton	516
Green v. Hudson R. R. Co.	512	Hardenburg v. Beecher	573
Green v. Kornegay	474	Hardin v. Hardin	254
Green v. London General Omni-		Harding v. Carter	301, 304
bus Co.	523	Hardwood v. Knapper	423
Green v. Palmer	94	Harlan v. Bernie	491
Green v. Tanner	248	Harlan v. Harlan	54
Green Bay etc. Co. v. Hewett ...	696	Harlan v. St. Louis etc. R. R. Co.	294
Greenough v. Greenough	155	Harman v. Fishar	323, 326
Greer v. State	344	Harman v. Gartman	496
Gregg v. James	592	Harmony v. Bingham	352, 355
Gregory v. Harrington	429	Harris v. Harris's Ex'r	429
Gregory v. Hill	675	Harris v. Haynes	642
Grenville v. Smith	174	Harris v. Hays	139
Gridley v. Garrison	728	Harris v. Morse	307
Griffin v. Bixby	329, 330	Harris v. Mullins	465
Griffith v. Frazier	217	Harris v. Taylor	157
Griffiths v. Earl of Dudley	294	Harrison v. Bailey	423
Griffits v. Reed	342	Harrison v. Farmers' and M.	
Grim v. Weissenberg School Dis-		Bank	147
trict	588	Harrison v. Mitchell	217, 218
Grimes's Estate v. Norris	693	Harrison v. State	675
Grimalley v. Hooker	444	Harrison v. Weldon	217
Groves v. Steel	51	Harrison v. Wyse	775
Grubb's Appeal	536	Hart v. Carroll	580
Gaillaume v. Hamburgh & A. P.		Hart v. Smith	719
Co.	379	Hart v. United States	764
Guille v. Swan	700	Hartshorn v. Day	601
Guion v. Knapp	255	Hartzell v. Commonwealth	554
Gungrich v. Folts	613	Harvey v. Brydges	677
Gunn v. Howell	121, 175	Harvey v. Heirs of Sullens	139
Gunn v. Todd	345	Harvey v. Mayne	678
Gurns v. Chicago etc. R. R. Co. .	294	Harvey v. Varnay	429
Gyre v. Culver	674, 677	Harvin v. Weeks	423
		Hasbrouk v. Tappen	309
Hackett v. Bownell	679	Hassem v. Day	576
Hackett v. B. C. & M. Railroad.	206	Hatch v. Coddington	638
Haden v. Garden	750	Hatch v. Dwight	212

	PAGE		PAGE
Haupt v. Henninger.....	550	Hill v. Wentworth.....	643
Hawkins v. Governor.....	155	Hills v. Mills.....	216
Hawkins v. Reichert.....	775	Hindley v. Westmeath.....	226
Hawks v. Patton.....	63	Hinton v. Dibbin.....	289
Hawley v. Clowes.....	532	Hitchcock v. Thurland.....	596
Hawthorn v. City of St. Louis..	669	Hitchin v. Campbell.....	192
Haycock v. Greup.....	550	Hoar v. Maine Cent. R. R. Co... 294	
Haydon v. Stewart.....	344	Hobson v. Blackburn.....	478, 479
Hayes v. State.....	675	Hoe v. Sanborn.....	461, 465
Hayne v. Maltby.....	600	Hoffman v. Armstrong.....	330, 331
Haynes v. Rudd.....	400	Hoffman v. King.....	667
Haynie v. Hall's Ex'r.....	491	Hoffner v. Clark.....	556
Haywood v. Hammond.....	519	Hogeden v. Hubbard.....	678
Hazard v. Treadwell.....	637	Holcombe v. Hewson.....	232
Hasman v. Hoboken L. & I. Co..	404	Holday v. Peters.....	519
Heath v. Van Cott.....	428	Holder v. Coats.....	328, 329, 330
Hecklin v. Ess.....	91	Hollingham v. Head.....	230
Heermance v. Vernoy.....	676	Hollis v. Francois.....	128
Hegeman v. Western R. R. Corp.	290, 371, 402, 403	Hollister v. Judges.....	174
Hei v. Heller.....	696	Hollister v. Nowlen.....	284
Heineman v. Grand Trunk R'y Co.....	290, 379	Holloway v. Memphis etc. R. R. Co.....	121
Heinlin v. Castro.....	757	Holman v. Bank of Norfolk.....	153
Heister v. Fortner.....	613	Holman v. Johnson.....	427
Hele v. Stowal.....	219	Holt v. Lamb.....	485
Hemphill v. Hemphill.....	551	Homes v. City of Fond du Lac... 679	
Hempstead v. Johnston.....	520	Homes v. Dana.....	121
Henckley v. Hendrickson.....	634	Hooper v. Chicago & N. W. R'y Co.....	363
Henderson v. Henderson.....	408, 413	Hooser v. Hays.....	54
Henderson v. Simmons.....	659	Hooper v. Stuart.....	216
Hendricks v. Johnson.....	732	Hooper v. Wells, Fargo, & Co... 370	
Hendrickson v. Evans.....	429	Hooper v. Welts.....	295
Henry v. Brown.....	260	Hopkins v. Atlantic etc. R. R. Co. 523	
Henry v. Daly.....	359	Hopkins v. Dickson.....	678
Henry v. Doctor.....	440	Hopkins v. Upshur.....	121
Henry v. Henry.....	618	Horr v. Barker.....	667
Henry v. Milham.....	264	Horton v. Maffitt.....	123
Henry v. Pittsburg and A. Bridge Co.....	558, 559	Hosier v. Hall.....	613
Hern v. Hopkins.....	274	Hosley v. Brooks.....	63
Hern v. Nicholls.....	262	Hough v. City Fire Ins. Co.....	722
Hern v. Nichols.....	383, 387	Houghton v. Rushby.....	599
Herring v. Hoppock.....	701	Houstine v. O'Donnell.....	345
Hewlett's Case.....	222	Houston v. Williams.....	175
Heyland v. Badger.....	775	Houston etc. R. R. Co. v. Moore. 293	
Heyneman v. Dannenberg.....	444	Hoy v. Bramhall.....	257
Heyward v. Judd.....	104	Hoyt v. Gelston.....	89
Hibbard v. Western U. Tel. Co..	688, 689	Hoyt v. Howe.....	117, 696, 697, 698
Hicks v. Coleman.....	747	Howard v. Henriques.....	752
Higbie v. Westlake.....	658	Howard Ins. Co. v. Halsey.....	257
Higgins v. Emmons.....	707	Howard v. Robinson.....	769
Higley v. Gilmer.....	294	Howe, Matter of.....	612
Hildreth v. Tomlinson.....	141	Howell v. Ransom.....	397
Hill v. Brinkley.....	727	Howland v. Carson.....	492
Hill v. Chipman.....	688	Howton v. Frearson.....	622
Hill v. Davis.....	192	Hubbard v. Concord.....	206, 232, 473
Hill v. Draper.....	746	Hubbard v. Curtis.....	621
Hill v. Hoover.....	175	Hubbell v. Hubbell.....	444
Hill v. La Crosse and Milwaukee R. R. Co.....	669	Hubert v. Mendheim.....	762, 764
Hill v. McCarter.....	257	Hudnal v. Wilder.....	520
		Hudson v. Howlett.....	343
		Huff v. Richardson.....	490
		Hulet v. Swift.....	363

CASES CITED.

33

	PAGE		PAGE
Halts v. Commonwealth.....	763	James v. Morey.....	359
Hume v. Oldacre.....	327	Jarvis v. Jarvis.....	556
Humphreys v. McCall.....	444	Jeffers v. Cook.....	758
Hunt v. Crane.....	162, 658	Jeffersonville etc. R. R. Co. v.	
Hunt v. Grant.....	174	Oyler.....	776
Hunt v. Test.....	155	Jeffries v. Ankeny.....	472
Hunt v. Thurman.....	667	Je Jonge v. Goldsmith.....	401
Hunter v. Potts.....	132	Jellison v. Goodwin.....	63
Hunter v. Watson.....	613, 773	Jenkins v. Tucker.....	512
Huppert v. Morrison.....	678	Jenkins v. Wheeler.....	355
Hurd v. Gill.....	344	Jenkins, Goods of.....	216
Huston v. Williams.....	604	Jennison v. Halbert.....	612
Hutchins v. Johnson.....	269	Jennings v. Sherman.....	665, 666
Hutchinson v. Andaley.....	678	Jesup v. City Bank of Racine..	705
Hutchinson v. Horn.....	573	Jewett v. Lincoln.....	667
Hutsen v. Mayor etc.....	64, 473	J. L. Case etc. Co. v. Miracle..	670
Huyler's Ex'rs v. Atwood.....	243	Johnson v. Atlantic & St. L. R.	
Hyatt v. Wood.....	677	R. Co.....	188
Hyde v. Trent Nav. Co.....	363	Johnson v. Bloodgood.....	264
Hyer v. Nolan.....	51	Johnson v. Corpenning.....	216
		Johnson v. Erskine.....	760
Illinois Cent. R. R. Co. v. Cope-		Johnson v. Great Western etc.	
land.....	292	R'y Co.....	291
Illinois Cent. R. R. Co. v. Cox..	320	Johnson v. Johnson.....	277
Illinois Cent. R. R. Co. v. Read..	291,	Johnson v. Lewis.....	208, 211
	295	Johnson v. Morley.....	428
Illinois and M. Canal v. Chicago.	165	Johnson v. Patterson.....	159, 674
Imboden v. Hunter.....	749	Johnson v. Perry.....	678
Indiana Cent. R. R. Co. v. Mundy	295	Johnson v. Sherman.....	51, 768, 771, 775
Indianapolis etc. R. R. Co. v.		Johnson v. Spiller.....	192
riest.....	292	Johnson v. State.....	607, 608, 736
Ingalls v. Eaton.....	710	Johnson v. Titus.....	356
Ingersoll v. Roe.....	400	Johnston v. Harvey.....	518
Inglis v. Usherwood.....	322	Jolly v. Single.....	688
Inhabitants of Saco v. Went-		Jones v. Bird.....	559
worth.....	536	Jones v. Diederich.....	400
Inalee v. Hampton.....	359	Jones v. Fort.....	343
Insurance Co. v. McCain.....	638	Jones v. Inhabitants of Waltham.	473
Insurance Co. v. McGookney.....	723	Jones v. Jones.....	253
Insurance Co. v. O'Maley.....	506	Jones v. Robinson.....	139
Insurance Co. v. Wilkinson.....	723	Jones v. Scanland.....	764
Iowa Railroad Land Co. v. Soper	588	Jones v. State.....	607, 764
Ireland v. Riddle.....	575	Jones's Adm'r v. Osmer's Ex'r..	428
Irving Bank v. Wetherald.....	336	Jordan v. Robinson.....	414
Isberg v. Bowden.....	591	Josselyn v. Ames.....	106
Israel v. Arthur.....	199	Judge v. Vogel.....	59
Ives v. Humphreys.....	682	Judson v. Cook.....	700, 701
Ives v. Van Epps.....	357, 358	Junkin v. Davis.....	412
		Justices v. Bartlett.....	763
Jackson v. Blodget.....	264	Justices v. Wynn.....	760
Jackson v. Bronson.....	769	Jusan v. Toulmin.....	634
Jackson v. Butler.....	72		
Jackson v. Clopton.....	729	Kaehler v. Dobberpahl.....	719
Jackson v. Smith.....	232	Kanavan's Case.....	516
Jackson v. Steamboat Magnolia..	234	Kane v. Jenkinson.....	667
Jackson v. Town.....	613	Kansas Pac. R. R. Co. v. Peavey.	294
Jackson v. Van Dalfen.....	748	Kavanaugh v. City of Janesville.	678
Jackson v. Walsen.....	748	Keaton v. Scott.....	128
Jackson v. Willard.....	769	Keaton v. Thomasson's Lessee..	573
Jacob v. Allen.....	217	Keegan v. Western R. R. Co.....	317
Jacobus v. St. Paul etc. R. R.		Keeney v. Grand Trunk R'y Co.	290
Co.....	292, 295, 379	Kekewich v. Manning.....	499
James v. Bird's Adm'r.....	428	Keirsted v. Avery.....	611

	PAGE		PAGE
Keller v. Johnson.....	121	Kunkle v. State.....	675
Kelley v. Corson.....	717	Kyle, Ex parte.....	727
Kellogg v. Denalow.....	634	Kyle v. Greene.....	176
Kellogg v. Forayth.....	766		
Kelly v. Baker.....	117	Lacon v. Barnard.....	594
Kelly v. Benedict.....	668	Ladd v. Wiggins.....	58
Kelly v. Roberts.....	349	Laforge v. Jayne.....	490
Kelsey v. Bush.....	340	Lakin v. Ames.....	512, 513
Kemp v. Wickes.....	511	Lamb v. Camden & A. R. R. Co.	363, 379
Kennerly v. Shepley.....	78		
Kent v. Lasley.....	713	Lambe v. Orton.....	499
Keough v. McNitt.....	72	Lametti v. Anderson.....	169
Kepler v. Keefer.....	121	Landers v. Staten Island R. R. Co.	308
Kerman v. Howard.....	401	Lane v. Cotton.....	383
Kerwhacker v. Cleveland C. & C. R. R. Co.....	436, 437	Lane v. Dorman.....	153, 154, 155
Ketchingham v. State.....	343	Lane v. Nelson.....	588
Kibby v. Chitwood.....	153	Lane v. Owings.....	730
Kidd v. Laird.....	188	Lamer v. British Bank.....	343
Kilburn v. Adams.....	498	Lannen v. Albany Gas Light Co.....	321
Kilburn v. Demming.....	644	La Riviere v. La Riviere.....	160
Kile v. Tubbs.....	747	Lascher v. Williamson.....	360
Kiley v. Western U. T. Co.....	308	Latterett v. Cook.....	315
Kimball v. Cunningham.....	633	Lattin v. Davis.....	358
Kimball v. Fisk.....	215	Lawall v. Kreidler.....	508
Kimberly v. Patchin.....	667	Lawrence v. Langley.....	177
Kincannon v. Carroll.....	761	Lawrence v. McCalmont.....	466
King v. Arnesby.....	225	Lawson v. Chicago etc. R. R. Co.	292
King v. Chase.....	214	Lawton v. Rivers.....	498
King v. Downs.....	165	Layman v. Hendrix.....	737
King v. Franklin.....	327	Leaird v. Davis.....	678
King v. Hoare.....	594, 595	Leakey v. Manpin.....	147
King v. Lynn.....	515	Leame v. Bray.....	700, 701
King v. Smith.....	314	Lee v. Atkinson.....	678
King v. Van Gilder.....	410	Lee v. Baldwin.....	466
Kingsley v. Gilman.....	91	Lee v. Lee.....	592
Kinney v. Central R. R. Co.....	291, 379	Lee v. Marsh.....	290, 397
Kinney v. Crocker.....	689	Lee v. Tillotson.....	536
Kirkland v. Dinsmore.....	294, 390	Lee v. Village of Sandy Hill....	290
Kirkpatrick v. Buford.....	128	Lee's Adm'r v. Lee.....	262
Kirkwood v. Miller.....	703	Lefebvre v. Dutrait.....	400
Kisor's Appeal.....	536	Leger v. Doyle.....	573
Kitchen v. Campbell.....	192	Leggett v. Hunter.....	153
Kittredge v. Folsom.....	217, 218, 219, 220	Legh v. Legh.....	264
Kleaty v. Delles.....	696	Lehey v. Hudson River R. R. Co.....	380
Klauder v. McGrath.....	703	Lehman, Ex parte.....	729
Klaus v. City of Green Bay.....	698	Leighton v. Walker.....	165
Klein v. Gehrung.....	735	Leitensdorfer v. Delphy.....	243
Kline v. Cent. Pac. R. R. Co....	294	Lemon v. Trull.....	358
Klopp v. Witmoyer.....	568	Lendall v. Pinfold.....	596
Kneass's Appeal.....	153	Lent v. Shear.....	757
Kneeder v. Borough of Norris- town.....	487	Leonard v. Fowler.....	360
Knell v. U. S. etc. Steamship Co.	290, 379	Lessee of Fowler v. Whiteman..	451
		Lester v. Sutton.....	345
Knickerbocker v. People.....	336	Lestrade v. Barth.....	773
Knowlton v. Culver.....	54	Levering v. Washington.....	106, 107
Koch v. Briggs.....	768	Lewis v. Babcock.....	673
Konigsmacher v. Kimmel.....	269	Lewis v. Buck.....	98, 94
Konitaky v. Meyer.....	414	Lewis v. McMillan.....	360
Kortright v. Cady.....	775	Lewis v. Ross.....	174
Kramer v. Sandford.....	176	Lewis v. Scofield.....	475, 477, 485
Krom v. Levy.....	359	Lewiston Falls Bank v. Leonard.	108

CASES CITED.

35

	PAGE		PAGE
Lexington Life etc. Ins. Co. v. Page.....	491	Malton v. Nesbit	230
Lide v. Hadley.....	625	Maltz v. Fletcher	51
Lieman v. Dinmore.....	380	Mandeville v. Reynolds	411
Limerick, Petitioner.....	174	Manhattan Life Ins. Co. v. Pauli-son	276
Lincoln v. Saratoga and Schoenectady R. R. Co.....	283	Mann v. Birchard.....	290
Lindley v. Kelley.....	157	Mansfield v. Dorland.....	727
Lindsay v. Jackson.....	359	Mansfield v. Mansfield	200
Ling v. Ling.....	199	Many v. Noyes.....	234
Linn v. Wright.....	634	Marcy v. Barnes.....	550
Lisecomb v. Postall	213, 658	Marker v. Marker	254
Lisbon v. Liman.....	188	Marienthal v. Taylor.....	106
Little Schuylkill etc. Co. v. Nor-ton.....	540	Marine Nat. Bank v. National City Bank	336
Littlefield v. Storey.....	264	Markinson v. Penson.....	470
Livermore v. Bainbridge.....	359	Marquart v. La Farge.....	686
Livermore v. Boutelle.....	444	Marah v. Armstrong.....	94
Livermore v. St. John.....	345	Marah v. Gilbert.....	395
Lockhart v. Luker.....	673	Marah v. Potter.....	673
Lockwood v. Bishop.....	401	Marah v. Supervisors.....	719
Lodge v. Phipper	546, 547, 549	Marshall v. Hamilton.....	764
Long v. Kingsdon.....	104	Marshall v. Mitchell.....	179
Long v. Lewis.....	726	Marshall v. Morris.....	156
Long v. Morrison.....	678	Marshall v. Stewart.....	317, 320
Long v. Tardy.....	250	Marston v. Bank of Mobile.....	177
Long's Appeal.....	536	Martin v. Bell.....	128
Loomis v. Terry.....	159, 675	Martin v. Maner.....	349
Lord v. Morris.....	755, 757, 769	Martin v. Nicolls.....	409
Lorman v. Benson.....	188	Marvin v. Herriok.....	314
Lothrop v. Page.....	174	Mason v. Ditchbourne.....	602
Loton v. Loton.....	216	Mason v. Fox.....	174
Lounsbury v. Locander.....	243	Mason v. Waite.....	165
Lovejoy v. Murray.....	597	Maalin v. Baltimore etc. R. R. Co.....	292, 295
Lovejoy v. Whipple.....	121	Masters v. Pollie.....	329, 330
Low v. Allen.....	757	Masterton v. Mayor etc. of Brook-lyn	683
Low v. Mussy.....	414	Matchin v. Matchin.....	279
Lowrie v. Plitt.....	514	Matthews v. Douthitt.....	217
Lowry v. Hall.....	183	Matthews v. Lee.....	760
Loyd v. McCaffrey.....	520	Matts v. Hawkins.....	330
Lucas v. Sullivan.....	139	Mavor v. Dry.....	259
Ludlow v. New York & H. R. R. Co.....	169	Maxham v. Day.....	54
Lyerly v. Wheeler.....	576, 616	Maxwell, Ex parte.....	222, 658
Lyman v. Babcock.....	668	May v. Brown.....	61
Lyman v. Hale.....	329, 331	Mayne v. Baldwin.....	226
Lyme v. Allen.....	751	Mayor v. Randolph.....	558
Lynde v. Hough.....	171	Mayor etc. of Baltimore v. Root.....	669, 670
Lynde v. McGregor.....	345	Mayor etc. of Mobile v. Rowland.....	669
Lynn v. Adams.....	470	McAdams v. Cates.....	141
Lyon v. Marclay.....	499	McAllister v. Reab.....	357
Lyon v. McGuffey.....	276	McArthur v. Saginaw.....	64
Lyons v. Blenkin.....	225	McAuley v. State.....	674
Machias Hotel Co. v. Coyle.....	121	McCaraher v. Commonwealth.....	760
Mack v. Wetzel.....	775	McCartee v. Orphan Asylum.....	164
Mackinley v. McGregor.....	667	McCarthy v. Niskern.....	91
Magee v. Holland.....	228	McCausland v. Ralston.....	428
Magee v. Toland.....	148	McCawley v. Furness R'y Co.....	291
Maguin v. Dinmore.....	379	McChord v. Fisher.....	217
Maguire v. Card.....	236	McClellan v. Cumberland Bank.....	730
Mallacia v. Hodgson.....	602	McClellan v. Hetherington.....	659
Mali v. Lord.....	395	McClung v. Spotswood.....	787

	PAGE		PAGE
McClure v. Maynard.....	343	Merrick v. Avery	235
McClure v. McClure	580	Merrick v. Butler.....	429
McComb v. Gilkey.....	153	Merrifield v. Cobleigh.....	169
McComb v. Thompson.....	106, 108	Merrill v. Harris.....	214
McCombs v. McKennan.....	667	Merrill v. Lake.....	751
McCombs v. State.....	445	Merritt v. Johnson.....	350
McCorkle v. Binns.....	545	Merritt v. Miller.....	676
McCormick v. Sarson.....	360	Merwin v. City of Chicago.....	670
McCoy v. Danley.....	188, 735	Messer v. Oestreich.....	668
McCoy v. Lemon.....	540	Messer v. Woodman.....	667
McCoy v. State.....	675	Metcalfe, Goods of.....	218
McCracken v. Todd.....	764	Methvin v. Methvin.....	254
McCravey v. Remson.....	56	Metzer v. State.....	343
McCune v. Norwich City Gas Co.	688	Meyer v. Hahner.....	638
McCutcheon v. Homer.....	64	Middleton v. Crofts.....	164
McDaniel v. State.....	675	Middlesex Bank v. Butman.....	412
McDonald v. Bunn.....	314	Miles v. Vanhorn.....	262
McDonald v. Napier.....	728	Milford v. Worcester.....	369
McDonald v. Western R. R. Corp.	363	Miller v. Bingham.....	147
McElwain v. Erie R'y Co.....	290	Miller v. Marek.....	428
McEwan v. Zimmer.....	412	Miller v. McDonald.....	655
McGahan v. Carr.....	747	Miller v. State.....	606
McGar v. Williams.....	634	Mills v. Carter.....	218
McGill v. Ash.....	494, 495	Mills v. Gleason.....	717, 719
McIlvoy v. Cochran.....	674, 675	Mills v. Hall.....	734
McIntire v. Young.....	63	Mills v. Hoag.....	417
McIntyre v. Harris.....	343	Mills v. Wooters.....	678
McKibbin v. Kline.....	556	Millward v. Midland R'y Co....	294
McKinnon v. McDonald.....	281	Milne v. Moreton.....	133
McKnight v. Devlin.....	360	Milsap v. Stone.....	747
McLemore v. Pinkston.....	281	Miltimore v. Supervisors of Rock	
McLeod v. Pearce.....	568	Co.....	717, 718
McManus v. Crickett.....	524	Milwaukee etc. R. R. Co. v. Hun-	
McMichael v. McDermott.....	567	ter.....	540
McMillan v. Richards.....	59, 123, 573, 767, 769, 770	Milwaukee & Miss. R. R. Co. v.	
McNair v. Jenson.....	144	Finney.....	666
McNeal v. Clement.....	355	Miner v. Phoenix Ins. Co.....	723
McNealey v. Hart.....	568	Minnesota v. Gut.....	110
McNeilly v. Continental Life Ins.		Minnesota v. Monnier.....	104
Co.....	638	Misselbeck v. Greime.....	343
McPadden v. N. Y. Cent. R. R.		Mitchell v. De Witt.....	616
Co.....	404	Mitchell v. Oldfield.....	726
McPherson v. Waters.....	56	Mitchell v. Rockland.....	64
McQuesten v. Morgan.....	169	Mitchell v. Zimmerman.....	634
McRae v. Stokes.....	315	Mixer v. Howarth.....	663
McVicker v. May.....	556	Mobile etc. R. R. Co. v. Hopkins	292
Mead v. Small.....	176	Mobile, Mayor etc. of, v. Rowland	669
Meagher v. Driscoll.....	513, 516	Moffett v. Brewer.....	734
Mechanics' Bank v. Bank of Co-		Mohawk Bank v. Burrows.....	728
lumbia.....	665	Mohr v. Gault.....	188, 735
Mechanics' Bank v. Griswold....	176	Monongahela Navigation Co. v.	
Mechanics' Bank v. New York and		Koons.....	558
New Haven R. R. Co. 381, 382, 383,		Monroe v. Douglas.....	409, 412, 414
385		Monroe v. Hussey.....	556
Mechler v. Phoenix Ins. Co.....	723	Montelius v. Charles.....	108
Melliorucchy v. Miliurucchy.....	250	Moon v. Rollins.....	747
Memphis etc. R. R. Co. v. Chas-		Moore v. Clay.....	63
tine.....	293	Moore v. Fitchburg R. R. Corp..	523
Mendocino Co. v. Morris.....	762	Moore v. Hood.....	121
Menges v. Dentler.....	155, 588	Moore v. McKinley.....	763
Merchants' Ins. Co. v. Hinman..	512	Moore v. Pierson.....	580, 634
Merrell v. Campbell.....	670	Moore v. Protection Ins. Co.....	503
		Moore v. Smith.....	217

CASES CITED.

37

	PAGE		PAGE
Moore v. Starks	451	Newman v. Beaumont.....	216
Moore v. State	588, 764	Newark v. Liverpool etc. Fire and	
Moore v. Wright.....	343	Life Ins. Co.....	503
Mordaunt v. Monoreiffe	200	New Jersey S. N. Co. v. Mer-	
Morey v. Newfane	471	chants' Bank.....	284, 288
Morgan v. Burrows	668	Newton, Goods of.....	218
Morgan v. Smith.....	359	N. Y. Cent. R. R. Co. v. Lock-	
Morgan v. Still	638	wood.....	379
Morgan v. Walton	499	N.Y. & N. H. R. R. Co. v. Schny-	
Morris v. Delaware & S. O. Co.	164	ler.....	395
Morrison v. Kelly	613, 776	New York etc. Telegraph Co. v.	
Morrison v. Whiteside.....	213	Dryburg.....	525
Morrison v. Wilson	128	Niblo v. Binse.....	355
Morrow v. Whiteside..	147	Nicholas v. New York etc. R. R.	
Morse v. Gould.....	117	Co.....	294
Morton v. Naylor.....	347	Nicholas v. N. Y. Cent. & N. H.	
Morton's Case.....	596	R. R. Co.....	379
Moss v. State.....	747	Nichols v. Dusenbury.....	357, 358
Mott v. Clark.....	59, 249	Nichols v. Luce.....	623
Mott v. Robbins.....	764	Nicholson v. Taylor.....	667
Mower v. Leicester.....	470	Nichols v. Townsend.....	360
Moyer's Appeal.....	580	Nicoll v. New York & E. R. R.	
Mucklow v. Mangles.....	350	Co.....	169
Muhling v. Sattler	121	Nicoll v. Nicoll.....	728
Mulford v. Minch.....	668	Niel v. Thompson.....	582
Muller v. Eno.....	358	Nininger v. Norwood.....	735
Mulliken v. Anghinbaugh.....	133	Niver v. Best.....	428
Mullins v. Cottrell.....	343	Nixon v. Brownfield.....	490
Mumford v. Whitney.....	340	Nixon v. State.....	536
Munger v. Shannon.....	349	Nogees v. Nogees.....	425
Munsey v. Webster.....	218	Nolan v. Bank of N.Y. Nat. Bank	
Murphrey v. Wood.....	417	Ass'n.....	336
Murray v. Oliver.....	219	Nolton v. Western R. R. Co.....	284, 290, 292
Maynard v. Syracuse etc. R. R.			
Co.....	290, 379	Noonan v. Halsey.....	710
Murray v. South Carolina R. R.		Norris v. Norris's Adm'r.....	428
Co.....	159	Norris's Appeal.....	536
		North v. North.....	277
Nagle v. Macy.....	768	North River Bank v. Aymar.....	262, 384, 386, 395
Napier, Goods of.....	216	Northrup v. Foot.....	304
Nash v. Hoxie.....	667	Northrup v. Syracuse etc. R. R.	
Nashville etc. R. R. Co. v. Elliott.	290	Co.....	363
National Com. Bank v. National		Norton v. Woods.....	750
Mech. Bank.....	336	Nowell v. Wright.....	561
National L. I. Co. v. Minch.....	395	Noyes v. Smith.....	317, 320
Neate v. Ball.....	323, 326		
Neill v. Hill.....	301	Oakland Ice Co. v. Maxey.....	344
Neill v. Keese.....	167	Oberthier v. Stroud.....	612
Nellis v. Clark.....	428	O'Brien v. Norris.....	326
Nelms v. State.....	213	Ocean Ins. Co. v. Rider.....	727
Nelson v. Bostwick.....	707	O'Connor v. Hartford F. Ins. Co.	
Nelson v. Cook.....	737	O'Connor v. Pittsburgh.....	558
Nelson v. Hudson R. R. Co.....	379	Odiorne v. Lyford.....	496
Nelson v. Iverson.....	343	O'Donnell v. Sweeney.....	121
Nesbitt v. Dallam.....	568	Offley v. Best.....	216, 218, 219
New Albany etc. R. R. Co. v.		Ogden v. Coddington.....	358
Peterson.....	188	O'Brien v. Karing.....	360
Newbert v. Cunningham.....	729	Ogle v. Atkinson.....	322
Newcomb v. Butterfield.....	328	Ohio etc. R. R. Co. v. Muhling..	293
Newcomb v. Green.....	174	Ohio etc. R. R. Co. v. Selby....	292
Newcomb v. Newcomb.....	200	Ohio etc. Trust Co. v. Merchants'	
Newkirk v. Sahler.....	676	etc. Trust Co.....	526
Newlin v. Osborne.....	249		

	PAGE		PAGE
Olendorf v. Swarts.....	179	Pennsylvania Bank v. Jacobs....	546
O'Neill v. Chandler.....	429	Pennsylvania Co. v. Woodworth.	293
O'Neill v. Henderson.....	658	Pennsylvania R. R. Co. v. Brooka.	293
Oriental Bank v. Haskins.....	248	Pennsylvania R. R. Co. v. Butler.	292
Orme v. Roberts.....	612, 613	Pennsylvania R. R. Co. v. Hender-	
Ormond v. Holland.....	317, 318	son.....	292
Ormrod v. Huth.....	464	Pennsylvania R. R. Co. v. Kilgore.	540
Osborne v. Robbins.....	400	Pennsylvania R. R. Co. v. Price.	293
Otis v. Raymond.....	463	Penrudduck's Case.....	209, 210, 211
Oulds v. Harrison.....	591	People v. Brendreth.....	360
Overmeyer v. Koerner.....	580	People v. Coleman.....	153
Oyon's Succession.....	698	People v. Cooke.....	369
		People v. Cox.....	343
Pacific Ins. Co. v. Conard.....	89	People v. Cunningham.....	735
Packard v. Hill.....	412	People v. Dalton.....	515
Packer v. Hinckley Locomotive		People v. Dann.....	675
Works.....	637	People v. Kingston Turnpike R.	
Packman's Case.....	217, 219	Co.....	301
Painter's Estate, In re.....	498	People v. Lambert.....	369
Palairot's Appeal.....	588	People v. Mahoney.....	747
Palmer v. Crook.....	432	People v. McCann.....	110
Palmer v. Mayor etc. of New		People v. Mercier.....	225, 226
York.....	305	People v. Organ.....	763
Palmer v. Oakley.....	147, 554, 658	People v. Payne.....	675
Parker, Estate of.....	588	People v. Phoenix Bank.....	301
Parker v. Barker.....	344	People v. Rochester etc. R. R. Co.	302
Parker v. Baxter.....	349	People v. Seymour.....	719
Parker v. Coop.....	613	People v. Shannon.....	761
Parker v. Jones.....	166	People v. Slocum.....	760, 764
Parker v. Mise.....	213	People v. Troy and Boston R. R.	
Parkerson v. Wightman.....	737	Co.....	301
Parkinson v. State.....	110	People ex rel. Coppers v. Trustees	
Parnell v. Parnell.....	200	of St. Patrick's Cathedral.....	512, 513
Parrill v. McKinley.....	262	Peoria Bridge Ass'n v. Loomis...	540
Parks v. Morris A. & T. Co.....	360	Pepper v. State.....	763
Partridge v. Messer.....	602	Perkins v. Catlin.....	108
Patch v. City of Covington.....	64	Perkins v. N. Y. C. R. R. Co....	369, 371, 377
Pate v. Mitchell.....	710	Perkins v. Spaulding.....	565
Peterson Gas Light Co. v. Brady.	688	Perkins v. Sterne.....	58, 59, 757
Patrick v. Colerick.....	676	Perre v. Castro.....	58
Patterson v. Todd.....	108	Perry v. Marsh.....	320
Patterson v. Wallace.....	317, 318	Peterson v. Mulford.....	281
Patton's Appeal.....	217	Petrie v. Hanny.....	174
Patty v. Pease.....	255, 257	Peyser v. Mayor.....	400
Payne v. Burton.....	423	Phelps v. Conant.....	232
Payne v. Payne.....	425	Phelps v. Green.....	532
Peabody v. Carol.....	121	Phelps v. Rooney.....	711, 712
Pearce v. Patton.....	153	Philadelphia v. Shallcross.....	760
Pearsall v. Post.....	336	Philadelphia and Reading R. R.	
Peck v. City of Austin.....	64	Co. v. Derby.....	284
Peckham v. Gilman.....	106	Philadelphia W. & B. R. R. Co.	
Peebles v. Watt's Adm'r.....	554	v. Howard.....	683
Peek v. North Staffordshire R'y		Philadelphia, Wilmington, & Balt.	
Co.....	291	R. R. Co. v. Quigley.....	521
Peisch v. Dickson.....	664	Philhower v. Todd.....	260
Pelham v. Taylor.....	659	Philips v. Harrias.....	147
Pell v. McElroy.....	776	Phillips v. Hall.....	700
Pelton v. Platner.....	414	Phillips's Appeal.....	536
Penobscot R. R. Co. v. White...	613	Piatt v. St. Clair's Heirs.....	443
Pendelton v. Franklin.....	234	Pickens v. Yarrowborough's Adm'r..	468
Penn v. Hersey.....	444	Pierce v. Milwaukee and St. Paul	
Pennell v. Meyer.....	345	R'y Co.....	380
Pennock v. Hoover.....	274		

	PAGE		PAGE
Pierce v. Proprietors.....	516	Price v. Hunt.....	139
Pierce v. Proprietors of Swan Point Cemetery...510, 511, 512, 513, 514,	515	Price v. Nesbit.....	218
Pierce v. Richardson.....	763	Price v. Parker.....	216, 218, 219
Pierce v. Sellook.....	624	Price v. Taylor.....	243
Pierce v. Wood.....	634	Prince v. Samo....	339, 340, 341, 342,
Pierre v. Irvine.....	106		343
Pierson v. Smith.....	147	Prior v. White.....	250
Pillsbury v. Moore.....	212	Pritchard v. Brown.....	773
Pinckard v. Pinckard.....	254	Probasco v. Cook.....	51
Pinckney v. Brown.....	429	Proctor v. Hodgson.....	623
Piper v. White.....	345	Pryor v. Stone.....	117, 712
Pipon v. Wallis.....	218	Puraley v. Hayes.....	763
Pittman v. Gaty.....	774	Purviance v. Lemmon.....	581
Pittsburgh etc. R'y v. Hook....	667	Putnam v. Clark.....	249
Pittsburgh etc. R'y Co. v. Baby.	447	Putnam v. Schuyler.....	359
Plank v. New York etc. R. R. Co.....	321	Putnam v. Sullivan.....	263
Platner v. Platner.....	343	Pyle v. Pennock.....	570
Plumb v. Cattaraugus County M. I. Co.....	722	Quackenbos v. Edgar.....	360
Plumer v. Harper.....	208, 211	Queen v. Birmingham and Glou- cestershire.....	523
Polhill v. Walter.....	385, 463	Queen v. Great North of England R'y Co.....	523
Polk v. Gallant.....	613	Queen v. Stewart.....	506, 512
Polk v. Plummer.....	760	Queen's Case.....	338, 339, 343
Pond v. People.....	674	Quimby v. Adams.....	760
Pontiac v. Carter.....	64	Rader v. Johnson.....	763
Pool v. Gott.....	226	Railroad Co. v. Hampton.....	293
Pope v. Armstrong.....	723	Railroad Co. v. Lockwood....	291, 295
Popkin v. Popkin.....	277	Railroad v. Norton.....	538
Porter v. Hooper.....	496	Railroad Co. v. Sprayberry....	292
Porter v. Lane.....	728	Railton v. Matthews.....	484
Porter v. Vaughan.....	174	Railway Co. v. Stevens.....	292
Porter's Case.....	164	Raine, Goods of.....	479
Portsmouth Aqueduct Co. v. Con- cord and Portsmouth R. R....	187	Rains v. Commissioners of Can- terbury.....	216
Posey v. Rice.....	668	Rainsford v. Taynton.....	218
Postlethwait v. Freese.....	578	Rambler v. Tryon.....	139
Potts v. House.....	139	Ramsey v. Heenan.....	109
Potts v. Smith.....	554	Rankin v. Goddard.....	412, 413, 414
Pottgiesser v. Dorn.....	91	Ransom v. Mack.....	108
Poucher v. New York Cent. R. R. Co.....	290, 291	Rape v. Heaton.....	121
Powell v. Inman.....	426	Rathbun v. Rathbun.....	200
Powell v. Pennsylvania R. R. Co.....	403, 618	Ravenscroft v. Ravenscroft..	216, 217
Power v. Frick.....	547	Rawlinson v. Oriett.....	597
Pratt v. Bacon.....	261	Rawls v. Kennedy.....	167
Pratt v. Donovan.....	693, 694	Rawson v. Holland.....	363
Pratt v. Stocke.....	216	Rawson v. Pennsylvania R. R. Co.	380
Prentiss v. Brewer.....	668	Raymond v. City of Lowell....	64, 473
Prentiss v. Donelson.....	176	Raymond v. Howland.....	345
Prescott v. Brown.....	281	Raymond v. Smith.....	175
President etc. v. Corman.....	395	Real v. McAllister.....	358
President and Trustees etc. v. Moore.....	487	Read, In re.....	760
Preston v. Breedlove.....	616	Ream v. Watkins.....	162
Preston v. Crofut.....	247	Reay v. Richardson.....	665
Pribble v. Kent.....	618	Rector v. Hartt.....	568
Price v. Cole.....	612	Rector v. Waugh.....	243
Price v. Dewhurst.....	413	Reed v. Davis.....	89
Price v. Hartshorn.....	379	Reeds v. Morton.....	143
		Reeves v. Delaware etc. R. R. Co.	540
		Regent v. Williams.....	155
		Regina v. Crowhurst.....	606

	PAGE		PAGE
Regina v. Sharpe	514	Rolin v. Steward	685
Regina v. Smith	226	Rooney v. Second Avenue R. R.	
Regina v. Vann	516	Co.	726, 727
Reilly v. Mayer	255, 257	Root v. Brown	343, 344
Reimer v. Schlitz	703	Root v. Chandler	701
Reimer v. Stuber	498	Rose v. Des Moines Valley R'y	
Reimers v. Druce	413, 414	Co.	292, 294, 295, 380
Relyea v. Beaver	330	Roseboom v. Billington	103
Remick v. Butterfield	173	Rosebrook v. Rannals	360
Rex v. Allison	368	Ross v. Brayton	141
Rex v. Bow	225	Ross v. Fuller	737
Rex v. Inhabitants of Brampton.	365	Roundtree v. Brantley	735
Rex v. Jackson	164	Roseau v. City of Troy	512
Rex v. Pappineau	735	Rowe v. Addison	188
Rex v. Penson	368	Rowe v. Moses	678
Rex v. Sharpe	515	Rowley v. Brown	564
Rex v. Skeffington	225	Rowley v. Stoddard	730
Rexford v. Rexford	400	Rucker v. Mo. Pac. R. R. Co. ...	293
Rey v. Simpson	106	Russ v. Fay	620
Reynolds v. Harris	573, 705	Russell v. Men of Devon	470
Rhea v. Forsyth	532	Russell v. Mixer	273
Rhodes v. Brandt	516	Rutland v. Mendon	165
Ricardo v. Garcias	408	Ryan v. Copes	607
Rice v. Bernard	637	Ryan v. Ryan	428
Rice v. Isham	638		
Rice v. Parkman	153	Saco v. Wentworth	536
Richards v. Northwestern P. D.		Sacramento, City of, v. Dunlap ..	759
Church	511, 515	Sacramento Co. v. Bird	761, 762
Richards v. Rote	588	Sager v. State	344
Richardson v. Anthony	676	Sahlman v. Mills	667
Richardson v. Barker	61, 62	Salmond v. Price	440
Richardson v. Chynoweth	688	Salte v. Field	324
Richardson v. Copeland	570, 643	Sampson v. Easterby	169
Richardson v. Northrup	331	Sampson v. Henry	89
Richardson v. Thomas	491	Sampson v. Ohleyer	751
Riddle v. Brown	674	Sampson v. Overton	313
Riddle v. Proprietors	470	Sanborn v. Neilson	205
Robb v. Bosworth	678	Sanborn v. Sturtevant	91
Robbins v. Mount	404	Sanderson v. Bradford	134
Roberts v. Anderson	247, 248	Sandford v. Handy	262
Roberts v. Roberts	428	Sanford Mfg. Co. v. Wiggin	54
Roberts v. Walker	147	Santo v. State	110
Robeson v. Schuykill Nav. Co. ...	343	Saratoga & S. R. R. Co. v. Row.	631, 632
Rohde v. Thwaites	192		
Robinson v. Blakely	213	Sargent v. Adams	668
Robinson v. Ferry	344	Saunders v. Stotts	141
Robinson v. Fitchburg & W. R.R.	230	Sausey v. Gardner	147
Robinson v. Holt	190	Sawyer v. Joalin	326
Robinson v. Mayor of Franklin.	487	Sayles v. Smith	305
Robinson v. State	607	Scales v. Maude	498
Robinson's Case	164	Scheerer v. Stanley	573
Rocco v. Hackett	411	Schibely v. Westenholz	412
Rochester W. L. Co. v. Rochester	473	Schovener v. Lissauer	400
Rockwell v. Mutual L. Ins. Co. ...	668	Schohaire Co. v. Pindar	760
Roddy v. Cox	190	School District v. Boston etc. R.	
Rodgers v. Rodgers	260	R. Co.	292
Roe v. Day	345	School District No. 1. v. Dauchey.	353
Rogers v. Brent	573	School Trustees of Trenton v.	
Rogers v. Gilinger	643	Bennett	353
Rogers v. Smith	678	Schroeder v. Chicago etc. R. R.	
Rogers v. Watrous	165, 167	Co.	294
Rogers v. Wheeler	363	Schukraft v. Buck	355
Rogers et al., Appellants	475	Schwinger v. Raymond	359

	PAGE		PAGE
Screven v. Gregorie	625	Sisson v. Donnelly	243
Scribner v. Beach	674, 675, 677	Skinner v. Wilder	330, 331
Seruggs v. Bibb	344	Shipper v. Foster	728
Scobey v. Gano	454	Slee v. Manhattan Co.	749
Scott v. Freeland	749	Sleeper v. Pollard	556
Scott v. Mayor etc. of Manchester.	523	Slaughter v. Cunningham	315
Scott v. Shephard	700, 701	Slaughter v. May	218
Scott v. Wells	667	Slosson v. Lynch	512
Seacord v. Miller	177	Smilie v. Biddle	491
Sears v. Shafer	397	Smillie v. Quinn	401
Second v. First Congregational Society	222	Smith v. Administrators of Smith	580
Sealey v. Bishop	624	Smith v. Blagge	313
Seeman v. Feeney	91	Smith v. Brown	340
Seixas v. Woods	355	Smith v. Coolbaugh	696
Selway v. Fogg	631	Smith v. Crocker	768
Semine v. Semine	217, 219	Smith v. Dall	774
Senter & Co. v. Lambeth	613	Smith v. Durell	58
Settle v. Alison	315	Smith v. Field	324
Seven Bishops, The	544	Smith v. Grim	428
Sewall v. Eaton	326, 667	Smith v. Haverhill Mut. Ins. Co.	503
Sewall's Falls Bridge v. Fisk	685	Smith v. Hood	175
Seybolt v. New York etc. R. R. Co.	290, 293	Smith v. Hubbs	428
Seymour v. Greenwood	523	Smith v. Jones	340
Seymour v. Maddox	319, 320	Smith v. Lewis	123
Shaddon v. Knott	54	Smith v. McCluskey	355
Shackley v. Eastern R. R. Co.	302	Smith v. McIver	750
Shaeffer's Estate	490	Smith v. McLeod	419
Shain v. Markham	674	Smith v. McManus	108
Sharp v. Grey	402	Smith v. New York Cent. R. R. Co.	291
Sharp v. United States	760	Smith v. Painter	613
Sharpless etc. v. Mayor of Phila- delphia	155	Smith v. Randall	568
Shauer v. Shauer	753	Smith v. Redus	175
Sheffill v. Van Dusen	63	Smith v. Silence	63
Shehan v. Barnett	153	Smith v. Smith	261, 772
Sheldon v. Steamship Uncle Sam.	678	Smith v. Sparrow	308
Shelley's Case	241	Smith v. Stanley	58
Shepard v. Milwaukee Gas Light Co.	679, 688	Smith v. State	447
Shepherd v. Webster	412	Smith v. Supervisors of Barron Co.	667, 763
Sheriff v. Smith	315	Smith v. Taylor	762
Sherk v. Eudress	429	Smith v. Wingate	763
Sherman v. Hannibal etc. R. R. Co.	292	Smithwick v. Ward	540
Sherman v. Smith	395	Snell v. Bray	679
Sherwood v. Agricultural Ins. Co.	355	Snell v. Bridgewater etc. Co.	164
Shipman v. Horton	676	Snow v. Cowles	208, 212
Shoemaker v. Benedict	373, 491	Snyder v. Snyder	511, 512, 513, 515
Shoenberger v. School Directors.	153	Sohier v. Massachusetts General Hospital	152
Shuttleworth v. Bruce	349	Solomon v. Dreschler	120
Shuttleworth v. Dunlop	251	Some v. Barwiah	211
Sickels v. Pattison	353	Somes v. Brewer	248
Sickman v. Lapaley	429	Sourain v. Salorgue	162
Siegrist v. Arnot	293	South Sea Company v. Wymond- sell	490
Sigourney v. Sibley	216	Southern Express Co. v. Moon ..	292
Silver Lake Bank v. Harding	410, 414	Span v. Fly	321
Simpson v. Chapman	613	Spartan! arg etc. R. R. Co. v. De Graffenried	121
Simpson v. State	675	Specht v. Commonwealth	307
Sims v. Davis	496	Spencer v. Harvey	177
Sims v. Reed	676, 678	Spencer v. McGowan	676
Simsen v. Hart	359	Spencer's Case	168

	PAGE		PAGE
Spring v. Bourland.....	54	Stedman v. Western Transp. Co.	294
Springer v. Drasch.....	429	Stein v. Burden.....	188, 732, 734
Springer v. Dyer.....	360	Steinweg v. Erie R'y Co.....	295
Springer v. Toothaker.....	157	Steinway v. Erie R'y Co.....	379
Springs v. Erwin.....	217	Sterling v. Warden.....	678
Squire v. N. Y. Cent. R. R. Co.	379	Stern v. People.....	763
Squire v. Whipple.....	224	Stephens v. Crawford.....	760, 761
Stalker v. McDonald.....	336	Stephens v. Langley.....	219
Stallings v. Newman.....	63	Stephenson v. Bannister.....	313
Standish v. Vosberg.....	123	Stephenson v. Primrose.....	176
Stanhope v. Stanhope.....	197	Stevens v. Cooper.....	255
Starin v. People.....	343	Stevens v. Corn Exchange.....	336
Starkweather v. Quigley.....	331	Stevens v. Irwin.....	556
Starr v. Peck.....	367	Stevens v. Judson.....	601
State v. Berg.....	764	Stevenson v. Hoy.....	344
State v. Bowman.....	764	Steuer v. Lamoure.....	357, 358
State v. Brown.....	550	Stewart v. Allison.....	108
State v. Clover.....	225	Stewart v. Carter.....	762
State v. Commercial Bank.....	301	Stewart v. Hawley.....	305
State v. Elliott.....	344, 677	Stewart v. Iglehart.....	428
State v. Fourth N. H. T.....	301	Stewart v. Kearney.....	428
State v. Fredericks.....	761, 764	Stewart v. Strasburger.....	395
State v. Fry.....	152, 153	Stileman v. Ashdown.....	519
State v. Hampton.....	764	Stiles v. Hooker.....	734
State v. Hawkins.....	345	Stinson v. N. Y. Cent. R. R. Co.	379
State v. Heisey.....	761	Stinson v. Paine.....	290
State v. Humphrey.....	607	St. Louis Ins. Co. v. Kyle.....	503
State v. Kinsella.....	110	St. Martin v. Deamoyer.....	63
State v. Kirby.....	763	Stone v. Bassett.....	104
State v. Ludwig.....	121	Stone v. Sprague.....	309
State v. Lynch.....	762	Stoors v. City of Utica.....	473
State v. McAlpin.....	761	Stores v. Snow.....	429
State v. Morgan.....	565, 675	Story v. Elliott.....	304, 305
State v. Olin.....	315	Stover v. Ludwig.....	219
State v. Overton.....	525	St. Paul v. Colter.....	111
State v. Patterson.....	344, 674	St. Peters v. Rylands.....	290
State v. Peck.....	763	St. Paul, City of, v. Seitz.....	473
State v. Rhoades.....	760	Stracey and Wife.....	479
State v. Richardson.....	228	Strang v. People.....	447
State v. Richmond.....	216	Straw v. Greene.....	344
State v. Rood.....	365	Street v. Blay.....	357
State v. Ross.....	676	Strohn v. Hartford F. Ins. Co..	668
State v. Scott.....	226	Strong v. Bradley.....	567
State v. Shirley.....	761	Strong v. City of Stevens Point..	679
State v. Six.....	157	Stroud v. Casey.....	705
State v. Smith.....	228, 675	Stump v. Henry.....	616
State v. South.....	607	Sturge v. Buchanan.....	340, 345
State v. Twitty.....	121	Sturm v. Williams.....	343
State v. Vance.....	675	Stuyvesant v. Hone.....	256
State v. Whit.....	465	Stuyvesant v. Woodruff.....	498
State v. Wilson.....	215	Sullivan v. Philadelphia etc. R.R.	
State v. Woodward.....	675	Co.....	438
State v. Young.....	110	Sullivan v. Sullivan.....	253
State v. Zellers.....	675	Sunderland v. Westcott.....	290, 380
State ex rel. Attorney-General v.		Supervisors of Schoharie Co. v.	
Conklin.....	668	Pindar.....	760
State ex rel. Donohoe v. Richard-		Sutherland v. Carr.....	763
son.....	143	Sutherland v. Carter.....	54
State ex rel. Mayne v. Baldwin..	225	Sutton v. Crosby.....	326
State of Minnesota v. Gut.....	110	Swafford v. Whipple.....	51, 708, 710
Steamboat New World v. King.....	284, 289	Swamscott Machine Co. v. Walter	230
Stebbins v. Lathrop.....	218	Sweet v. Colgate.....	353
		Swett v. Cutts.....	183

CASES CITED.

43

	PAGE		PAGE
Sydnor v. Palmer.....	668	Treadwell v. Salisbury Mfg. Co.	302,
Symonds v. Clay County.....	64	444	
Symonds v. Harris.....	570	Trenton Banking Co. v. Wood-	
Syms v. Sym.....	217	ruff.....	272
Tallahassee, City of, v. Fortune..	473	Trevillo v. Tilford.....	506
Tallman v. Coffin.....	169	Truly v. Lane.....	262
Tallman v. White.....	744	Truly v. Wanser.....	750
Tappan v. Tappan.....	221	Trustees v. Peaslee.....	222
Tarback v. Marbury.....	519	Trustees v. Youmans.....	188
Tarleton v. Goldthwaite.....	491	Trustees of Baltimore Annual	
Tarlton v. Fisher.....	174	Conference v. Schell.....	698
Taylor v. Bryden.....	409	Tullis v. Orthwein.....	80, 81
Taylor v. Barron.....	315	Turner v. Trustees of Liverpool	
Taylor v. Boyden.....	414	Docks.....	322
Taylor v. Carryl.....	77, 234	Turnham's Ex'x v. Shouse.....	659
Taylor v. French.....	176	Turnpike Co. v. McCarty.....	301
Taylor v. Jones.....	519	Turwin v. Gibson.....	726
Taylor v. Place.....	153	Tyrrell v. Woodbridge.....	345
Taylor v. Shore.....	219	Ulrich v. McCormick.....	638
Taylor v. Sutton.....	172	Ulrich v. New York etc. R. R.	
Taylor v. Taylor.....	425	Co.....	290
Taylor v. Wilburn.....	139	Union Pacific R'y Co. v. Nichols.	293
Tayon v. Ladew.....	159	United States v. Bradley.....	761
Teaff v. Hewitt.....	570	United States v. Huckabee.....	400
Tebbets v. Tilton.....	214, 216	United States v. Humason.....	761
Telford v. Adams.....	429	United States v. Maurice.....	761
Tennel v. Ridler.....	303	United States v. Nelson.....	763
Tevis v. Randall.....	108, 722	United States v. Tingey.....	761
Thatcher v. Dartmouth Bridge..	213	Vace v. Stickney.....	90
Thom v. Bigland.....	463	Vale Mills v. Nashua.....	188
Thomas v. Butler.....	216	Valentine v. Maloney.....	776
Thomas v. Osborn.....	234	Vallee v. Damerque.....	412
Thomas v. Pullis.....	155	Vanatta v. Brewer.....	243
Thomas v. State.....	607	Van Hook v. Simmons.....	56
Thompson v. Androsoggin Co..	189	Van Hook v. Whitlock.....	134
Thompson v. Hackett.....	218	Vanderpool v. La Crosse etc. R.	
Thompson v. Jackson.....	284	R.....	698
Thompson v. Pioche.....	776	Van Dresser v. King.....	90
Thompson v. Richards.....	515	Van Epps v. Harrison.....	357
Thompson v. Rose.....	169	Van Keuren v. Parmelee.....	757
Thompson v. Steamboat Morton.	236	Van Santvoord v. St. John.....	363
Thoms v. Southard.....	236	Van Wy v. Clark.....	429
Thomson v. Dougherty.....	519	Varick v. Tallman.....	741
Thornton v. Wynn.....	358	Vaughan v. Davies.....	728
Thrall v. Smiley.....	343	Vaughen v. Haldeman.....	643
Thurston v. Rosenfield.....	136	Veazie v. Parker.....	774
Tickle v. Brown.....	497	Veiths v. Haggis.....	345
Tift v. Barton.....	565, 566	Verplanck v. Mer. Ins. Co.	260, 261
Tift v. Culver.....	89	Vibbard v. Staats.....	340
Tillotson v. Smith.....	212	Virgin, The.....	234
Timand v. Leland.....	264	Virginia etc. R. R. Co. v. Sayers.	292
Tingley v. Cowgill.....	139	Voorhees v. Earl.....	357
Tinnen v. Mobane.....	491	Voorhis v. Voorhis.....	337
Toledo etc. R. R. Co. v. Beggs..	291, 293	Voris v. Remshaw.....	172
Toledo etc. R. R. Co. v. Brooks.	293	Voyce v. Voyce.....	330
Tompeon v. Hickey.....	515	Vredenburg v. Burnet.....	249
Tonawanda R. R. Co. v. Mun-		Wabash etc. R. R. Co. v. Shack-	
ger.....	438	let.....	293
Towle v. Marrett.....	165	Wade v. Leroy.....	685
Traders' Bank v. Bradner.....	337	Wade v. Mason.....	54
Tranger v. Sassaman.....	495		

	PAGE		PAGE
Wade v. Moffett.....	326	Waters v. Munroe.....	179
Wadleigh v. Janvrin.....	643	Waters v. Towers.....	683
Waggoner v. Jermaine.....	208, 211	Wathen v. Chamberlin.....	359
Wailing v. Toll.....	340, 343	Watkins v. Holman.....	152, 153, 154
Wait v. Richardson.....	496	Watkins v. Pemberton.....	417
Wakefield v. Phelps.....	165	Watson v. Moore.....	345
Waldron v. Chase.....	667	Watts v. State.....	607
Walker v. Griggs.....	345	Watts v. Vankess.....	305
Walker v. Lide.....	492	Way v. Chicago etc. R. R. Co.....	293
Walker v. Blackwell.....	234	Weatherby v. Banham.....	193
Walker v. McConnico.....	428	Weaver v. Bush.....	674
Walker v. McDowell.....	156	Webb v. Beavan.....	676
Walker v. Shepardon.....	138	Webb v. Kennedy.....	121
Walker v. Walker.....	485	Webber v. Chapman.....	735
Walker v. Wells.....	668	Webster v. Atkinson.....	222
Wall v. Osborn.....	700	Webster v. Calder.....	345
Wallace v. Brown.....	144	Wedlake v. Sargent.....	602
Wallace v. Collins.....	251	Weed v. Weed.....	174
Wallace v. Fourth Presbyterian Church.....	498	Weeks v. Cole.....	250
Wallace v. Lawyer.....	670	Weeks v. City of Milwaukee.....	714, 716, 717
Waller v. Harris.....	123	Weeks v. Fox.....	395
Walmaley v. Milne.....	643	Weeks v. Weeks.....	147
Walpole v. Oxford.....	477	Wehrle v. Wehrle.....	454
Walrond v. Pollard.....	599	Weimer v. Clement.....	465
Walsh v. Hill.....	747	Welby v. Armstrong.....	428
Walton v. Armstrong.....	106	Welch v. Clark.....	496
Walters v. People.....	117	Welch v. Hazelton.....	358
Walters and Walker v. Whitlock.....	136	Welch v. Pittsburg etc. R. R. Co.....	618
Walters v. Washington Ins. Co.....	729	Welch v. Stowell.....	735
Walton v. Dickerson.....	727	Weid v. Walker.....	511, 512, 515
Walton v. Tusten.....	428	Wellauer v. Fellows.....	723
Ward v. Hen.....	492	Wells v. N. Y. C. R. R. Co.....	290, 291, 369, 371, 377
Ward v. Johnson.....	593	Wells v. Steam Nav. Co.....	288, 371, 376
Ward v. Powell.....	194	Wells v. Thomas.....	363
Ward v. Smith.....	682	Welsh v. Carter.....	356
Ward v. Wordsworth.....	726, 727	Wendell v. Mugridge.....	174
Ward's Ex'rs v. Hayne.....	257	West v. Bolton.....	676
Warde v. Ayre.....	674	West v. Cunningham.....	667
Wardell v. Eden.....	264	West Feliciana R. R. Co. v. Thornton.....	315
Warden v. Supervisors of Fond du Lac Co.....	717, 718	Westbourne v. Mordant.....	211
Ware v. Cartledge.....	63	Westcott v. Fargo.....	379
Ware v. Richardson.....	128	Western Ins. Co. v. Cropper.....	505
Warfield v. Lindell.....	747	Western Sav. Fund Soc. v. Philadelphia.....	167
Warner v. Erie Railway Co.....	295, 320, 404	Westfall v. Jones.....	428
Warner v. Whittaker.....	249	Westmeath v. Westmeath.....	225
Warren v. Fish.....	122	Weston's Case.....	164
Warren v. Van Brunt.....	101	Wheatley v. Baugh.....	188
Warrener v. Kingsmill.....	413	Wheelden v. Lowell.....	676
Warrensburg, City of, v. Simpson.....	157	Wheeler v. Connecticut M. L. L. Co.....	355
Washburn v. Bank of Bellows Falls.....	620	Wheelock v. Warschauer.....	776
Washburn v. Nashville etc. R. R. Co.....	290	Whelan v. Whelan.....	397
Washburn's Appeal.....	536	Whidden v. Seelye.....	121, 213
Wason v. Sanborn.....	212	Whipple v. Farrar.....	444
Waterbury v. New York etc. R. R. Co.....	293	Whipple v. Thayer.....	134
Waterman v. Johnson.....	665	Whitchoot v. Fox.....	171
Waterman v. Soper.....	323, 330	White v. Brooks.....	190
		White v. Crew.....	428

CASES CITED.

45

	PAGE		PAGE
White v. Miller.....	761	Wilson v. Pateman.....	217, 219
White v. Philbrick.....	597	Wilson v. State.....	608
White v. Twitchell.....	678	Wilson v. Twitty.....	568
White v. White.....	425	Winch v. Keeley.....	264
Whitefield v. South-Eastern R'y		Windham v. Rhame.....	540
Co.....	523	Windham v. State.....	608
Whitford v. Panama R. R. Co..	283	Wingate v. Wooten.....	219, 220
Whitehead v. N. Y. Life Ins. Co.	401	Winkley v. Foye.....	91
Whitehurst v. Hickey.....	762, 764	Winn v. Peckham.....	678
Whitehurst v. N. C. M. I. Co....	503	Winona and St. Peter R. R. Co.	
Whiting v. Sheboygan etc. R.		v. Waldron.....	111
R. Co.....	302	Winalow v. Boyden.....	106
Whitmarsh v. Campbell.....	260	Winalow v. Brown.....	730
Whitney v. Allaire.....	633	Winalow v. Commonwealth.....	760
Whitney v. Higgins.....	658	Winalow v. Leonard.....	667
Whitney v. Stark.....	556	Winalow v. Merchants' Ins. Co..	643
Whittlesey v. McMahon.....	520	Wisner v. Barnet.....	489
Whitton v. Whitton.....	172	Withers v. Wiberg.....	775
Wibert v. N. Y. & E. R. R. Co.	377	Withers v. Greene.....	257
Widening Beekman Street, In		Wofford v. McKenna.....	747
the Matter of.....	516	Wolfe v. Dowell.....	58
Wiggin v. Swett.....	417	Wood v. Doane.....	565
Wigmore v. Jay.....	320	Wood v. Gamble.....	414
Wilde v. Gibson.....	462, 463	Williams v. Preston.....	414
Wilder v. Case.....	358	Wood v. Goodfellow.....	758
Wilcox v. Calloway.....	147	Wood v. Manley.....	676
Wilcox v. Davis.....	72	Wood v. Milwaukee & St. P. R.R.	
Wilcox v. Mackenzie.....	78	Co.....	363
Wilhelm v. Cornell.....	344	Wood v. Washburn.....	760
Wilkes v. Hungerford Market Co.	685	Wood v. Wood.....	253
Wilkes v. Morefoot.....	599	Woodbridge v. Conner.....	737
Wilks v. Batterman.....	726	Woodcock v. Parker.....	174
Wilks v. Carmichael.....	727	Wooden v. Austin.....	380
Wilkinson v. Hoffman.....	670	Woodman v. Eastman.....	177
Wilkinson v. Leland.....	153	Woodman v. Hubbard.....	121, 307
Willard v. Eastman.....	616	Woodman v. Tufts.....	206, 207, 208, 209,
Willard v. Harvey.....	173		210, 212
Williams v. Allen.....	667	Woodruff v. Walling.....	412
Williams v. Androsoggin etc.		Woodward v. Seely.....	576
R. R. Co.....	728	Worth v. McAden.....	222
Williams v. Delaware etc. R. R.		Worthing v. Webster.....	747
Co.....	321	Worthy v. Worthy.....	200
Williams v. Jones.....	412	Worman v. Kramer.....	556
Williams v. Love.....	621	Worrall v. Rhoads.....	498
Williams v. Nelson.....	498, 735	Wright v. Cobleigh.....	727
Williams v. Paul.....	304	Wright v. Herrick.....	638
Williams v. Peyton.....	741	Wright v. Howard.....	732
Williams v. Potter.....	164	Wright v. Pyne.....	570
Williams v. School District.....	719	Wright v. State.....	608
Williams's Adm'r v. Williams....	429	Wright v. Wright's Lessee.....	155
Williamson v. McGinnis.....	730	Wyman v. Hurlbut.....	747
Williamson v. Woolf.....	764	Wynn v. Garland.....	580
Willis v. Farley.....	757	Wyse v. Dandridge.....	249, 612
Willis v. Morris.....	423		
Willis v. Quimby.....	206	Yale v. Dederer.....	616
Willoughby v. McCluer.....	655	Yarborough v. Bank of England.	523
Wills v. Noyes.....	89	Yeakle v. Winters.....	762
Wilson v. Cantrell.....	762	Young v. Perkins.....	105
Wilson v. Edmonds.....	214	Young v. State.....	764
Wilson v. Frazier.....	216	Youngs v. Lee.....	336
Wilson v. Lawrence.....	401		
Wilson v. Mackenzie.....	94	Zimmerman v. Huber.....	345
Wilson v. Mayor of N. Y.....	473	Zung v. Howland.....	294



AMERICAN DECISIONS.
VOL. LXXXII.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

COLMAN *v.* POST.

[10 MICHIGAN, 422.]

PARCEL EVIDENCE IS COMPETENT ON BEHALF OF DEFENSE IN SUIT BY MORTGAGEE, OR HIS ASSIGNEE, TO FORECLOSE MORTGAGE conditioned for the payment of a sum certain, that the mortgage was given to indemnify the mortgagee and such assignee for becoming bail for a third person, and that he had not become such bail, or having done so, he had been discharged of his liability without being damnified.

MORTGAGE CONDITIONED FOR PAYMENT OF NEGOTIABLE PROMISSORY NOTE, but really given and assigned with the note to indemnify the assignee for procuring bail, is discharged when the bail have been discharged without damage; and neither the assignee, nor one to whom he transfers the note and mortgage after due, can collect the amount thereof as bona fide holder.

THE opinion states the case.

H. B. Brown and James Miller, for the complainant.

Withey and Gray, for the defendants.

By Court, MANNING, J. The bill is to foreclose a mortgage executed by George Post and wife to Samuel Post, and assigned by Samuel Post, with another mortgage executed to him by Benedict Eldred, to Charles D. Colman, as security for Colman becoming bail for one William Post, or whoever he might get to become such bail. Colman procured Thomas M. Town to become bail, and assigned the mortgage to Town to indemnify him. The recognizance of bail, which was \$500, was forfeited, but the recognizance and forfeiture were afterwards discharged on the payment of \$250 by the defendant Christopher Post. Both mortgages were executed to Samuel

Post, to enable him to procure bail for William Post. And after the recognizance of bail was discharged, the two mortgages were assigned by Town, at the request of Charles D. Colman, to Norman J. Colman, the complainant, who insists he is entitled to a decree of foreclosure on two grounds: 1. That the parol evidence by which the foregoing facts are made to appear must be rejected, as it goes to contradict the face of the mortgage and assignments which are absolute in terms; 2. That Town was a *bona fide* holder of the promissory note secured by the mortgage, which note is payable to bearer, and was assigned to Town before it became due, by Charles D. Colman.

The consideration of a contract, as a general rule, to which there are some exceptions on grounds of public policy, may always be inquired into. Neither law nor equity, except in the cases just mentioned, will enforce a promise made with consideration, or where the consideration has wholly failed. There can be no doubt, if the present bill was filed by Samuel Post, that it would be competent for George Post to show by parol evidence that the mortgage was given to Samuel Post to indemnify him for becoming bail for William Post, and that he had not become such bail, or having become bail that he had been discharged of his liability without being damnified. And if this would be the case as to him, it is so as to his assignee, or the assignee of such assignee, who takes the mortgage subject to all equities existing between the mortgagor and mortgagee.

But it is said the mortgage is for the payment of a promissory negotiable note, instead of a bond, and that the note and mortgage were assigned to Town before the note was due, who thereby become a *bona fide* holder of the note, and that complainant, as Town's assignee, is entitled to all of his rights. This is true. But for what purpose was Town a *bona fide* holder of the note? As indemnity for having become bail for William Post. The note and mortgage were assigned to him for that purpose, and for no other. Until Town became bail, there was no consideration for the note, which up to that time was wholly inoperative as a promise that the law would enforce. And as Town was discharged of all liability as bail, he could not sustain an action on the note against George Post, the maker; neither can complainant, his assignee, to whom the note and mortgage were assigned after the note had become due.

There is one other matter to be noticed before disposing of the case. Bail was required in the sum of five hundred dollars. The Post mortgage, which the bill is filed to foreclose, is for five hundred dollars, and the Eldred mortgage for two hundred dollars. Charles D. Colman, who is a witness in the case for complainant, states that the two mortgages were assigned to him to secure him two hundred dollars for his services, as well as to indemnify bail. The evidence is conflicting on this point. But conceding all that is claimed for it, we are still of opinion that the five-hundred-dollar mortgage was intended to indemnify the bail, while the other might have been given for the services mentioned.

Both mortgages were assigned to Town, and by Town to complainant, who, we are to suppose, still holds the two-hundred-dollar mortgage; and as the amount of that mortgage is all complainant would be entitled to in any circumstances, we think the decree dismissing the bill should be affirmed with costs.

MARTIN, C. J., and CAMPBELL, J., concurred.

CHRISTIANCY, J., did not sit in this case.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CONVEYANCE OR ASSIGNMENT ABSOLUTE on its face was intended as a mortgage: *Corbit v. Smith*, 71 Am. Dec. 431; *Johnson v. Sherman*, 76 Id. 481.

ADMISSIBILITY OF PAROL EVIDENCE contradicting recital of consideration in deed: See *Swafford v. Whipple*, 54 Am. Dec. 496; *Groves v. Steel*, 46 Id. 551; *Burleigh v. Coffin*, 53 Id. 236.

THE PRINCIPAL CASE IS CITED to the point that parol evidence is admissible to show the purpose for which negotiable paper was given, in *Boeker v. Johnson*, 17 Mich. 46; *Maitz v. Fletcher*, 52 Id. 486; and is cited to the point that such evidence is admissible to explain the true consideration for a contract, and apply the instrument to the subject-matter, in *Hylar v. Nolan*, 45 Id. 267; *Prebace v. Cook*, 39 Id. 716.

CROUSE v. DERBYSHIRE.

[10 MICHIGAN, 473.]

DEFENDANT'S APPEARANCE AND ORAL ADMISSION OF CAUSE OF ACTION, for which the plaintiff declares in justice's court, authorize the entry of judgment against him, where the action is commenced by due service of process. The statute requires a written confession signed by the defendant only where the parties appear without process.

RIGHT OF PLAINTIFF TO RECOVER IN REPLEVIN FOR ONE HUNDRED BUSHELS OF WHEAT, which were measured out from a quantity in possession of the

defendant, is not affected by the fact that he did not bring the suit for the whole, although the evidence showed that all the wheat belonged to him, and that he did not own as tenant in common with others.

DERBYSHIRE brought replevin for one hundred bushels of wheat. To show title to the wheat, he introduced as evidence on the trial a judgment upon the justice's docket in a suit between himself as plaintiff, and one Church as defendant, which suit was commenced by summons. It also appeared that the defendant admitted the cause of action on the return day of the writ, whereupon the justice rendered judgment against him. The evidence was objected to on the ground that the justice had no authority to render judgment in the case without a confession in writing, signed by defendant, as required by statute, but the objection was overruled. Plaintiff then proved that, by virtue of the execution issued on this judgment, he caused to be levied upon and sold as the property of said Church, about thirty acres of wheat, which was afterwards harvested and thrashed by other claimants, and came into the defendant's possession, from whom the plaintiff demanded it; that the defendant refused to deliver it up, whereupon the plaintiff sued out a writ of replevin for one hundred bushels, and the officer measured out and took away that amount from the whole bulk of the wheat, which was about two hundred bushels in one undivided parcel. The court refused to charge certain requests of the defendant, as sufficiently appears in the opinion, but did charge, among other things, that if the jury "should find that by the levy and sale the said plaintiff was the owner of all the wheat in the bin, then there could be no objection to his replevying one hundred bushels of it." Verdict for plaintiff, and defendant brought error.

J. W. Longyear, for the plaintiff in error.

R. Strickland, for the defendant in error.

By Court, MARTIN, C. J. The judgment upon the justice's docket in the case of Derbyshire against Church was properly admitted and read in evidence. In cases regularly commenced by process, the parties may appear and plead, either orally or in writing; and the defendant may as well admit as deny the action. The legislature never contemplated so great an absurdity as to require proof by the sworn statements of a by-stander, that the defendant had confessed the

action in the presence of the justice, and in open court, in order to authorize the rendition of a judgment upon such admission. When the action is commenced by process, as in the case before the justice, and the parties appear, and the plaintiff declares and the defendant pleads, either by denial or confession of the action, there is, technically, an issue joined, and the jurisdiction of the justice to render a judgment is co-extensive under either plea. In the one case, he hears the proof from the mouths of witnesses; in the other, from the defendant. What the legislature meant by authorizing a justice of the peace to render judgment upon an issue joined between the parties, was simply that it should be upon pleadings; and any pleading known to the law which authorizes a finding and conclusion by the court, whether upon or without evidence, is within the spirit and the letter of the statute; and he hears the proofs and allegations of the parties as much upon a declaration and *cognovit* as though he received the sworn testimony of witnesses upon a declaration and plea denying the action. And there is no reason for any other construction of the statute; for no benefit can result from a departure from this common-law method, and requiring a denial of that which the party is willing to acknowledge, in order to confer the authority to render a judgment.

As the law now stands, parties may be witnesses in their own behalf, as well as for their adversary. How absurd would it be to refuse the confession of a defendant made in the progress of a trial, unless he should make it upon oath. If the admission of a party or his attorney made in the progress of a trial is binding, why should it not be equally so when made in open court, at the forming of the issue, to prevent expense and litigation. In my opinion, an oral admission or *cognovit* is within the statute, and confers upon the justice as ample jurisdiction to enter judgment, as would the sworn statements of witnesses.

But when a judgment is rendered without process, or the publicity and formality of a trial, the statute requires that the confession of the debtor shall be in writing, signed by himself in presence of the justice. In this case, the jurisdiction is acquired from the written confession, as in others it is from process and appearance. And it is to cases of voluntary appearance of the debtor only, without process, that the requirement of a confession in writing is limited.

We discover no error in the charge of the court, when viewed

in the light of the facts of this case. Whether the plaintiff, by replevying the one hundred bushels of wheat, abandoned all claim to the remainder or not, was immaterial; and so it was immaterial whether his title and claim should be limited to that quantity or not. For the purposes of this case, such only was his claim; and with any claim to or title in any other wheat the jury had no concern, unless to inquire whether the whole bulk was held in common by these parties. It is not claimed by the defendant's counsel that the defendant had any title to the wheat in common with the plaintiff before the writ was served, but that by replevying only one hundred bushels from the mass, he abandoned the remainder, and that, therefore, he thereby became thenceforward a tenant in common of the whole bulk, and cannot maintain the action. The fallacy of this argument is made apparent by its statement. The right of the plaintiff depends upon the condition of the title at the commencement of the action, and the replevy of but one hundred bushels cannot affect his right to recover, if the wheat was his, however it may be should any future action be brought for the residue.

We think, therefore, that the refusal of the court to charge as requested, and the charge as given, were correct; and the judgment is affirmed, with costs.

MANNING and CAMPBELL, JJ., concurred.

CHRISTIANCY, J., concurred in the result.

ORIGIN AND EXTENT OF REMEDY BY REPLEVIN: *Mankam v. Day*, 77 Am. Dec. 409. When action of replevin will lie: *Dearmon v. Blackburn*, 60 Id. 100; *Knowlton v. Culver*, 52 Id. 156; *Dodd v. McCraw*, 46 Id. 301; *Shaddon v. Knott*, 58 Id. 63; *Harlan v. Harlan*, 53 Id. 612. When replevin will not lie: *Spring v. Bourland*, 54 Id. 243; *Elliott v. Powell*, 36 Id. 200; *Hoozer v. Hays*, 50 Id. 540; *Sanford Mfg. Co. v. Wiggin*, 40 Id. 198; *Wade v. Mason*, 74 Id. 597.

THE PRINCIPAL CASE IS CITED IN *Sutherland v. Carter*, 52 Mich. 473, to the point that one who leases land upon the lessee's agreement to deliver in payment half the produce, is a tenant in common, as it respects such produce, and may bring replevin for it when in a condition for delivery.

GUGINS v. VAN GORDER.

[19 MICHIGAN, 522.]

TITLE TO LAND IS NOT REVESTED IN GRANTOR BY SUBSEQUENT REFUNDING OF PURCHASE-MONEY, and the destruction of the deed by agreement of the parties, after its execution and delivery. But the grantee, or any one who claims through him, is estopped from showing by parol the contents of the destroyed deed.

EJECTMENT to recover the undivided one fourth of certain lands. The opinion sufficiently states the facts.

S. L. Kilbourne, for the plaintiff.

A. S. Wheedon and O. Hawkins, for the defendant.

By Court, MANNING, J. The case states the land was taken of the government by Richard M. Gugins, in the name of Orrilla Gugins, his wife, and that the patent was issued in her name. That in 1838 or 1839 Gugins and wife sold the land to Harrison P. Goodrich, and executed and delivered to him a deed therefor; that in three or four days thereafter Goodrich delivered back the deed to them, and received from them the consideration he had paid for the land, and that the deed was then destroyed by agreement of all the parties. The other facts in the case, except the death of Richard and Orrilla, that the plaintiff is one of four children left by them, and that defendant claims title through Goodrich, it is unnecessary to notice, as the only questions in the case are, first, whether the destruction of the deed revested the title in Orrilla; and if not, then, secondly, whether under the circumstances stated in the case, Goodrich and those claiming under him are estopped from giving parol evidence of the contents of the destroyed deed.

On the first point, there is no doubt that the destruction of the deed did not revest the title in Orrilla. On the execution and delivery of the deed to Goodrich, the title vested in him. It was not registered, but registry was not necessary to give it effect. And the destruction of the deed, which is evidence of title, and not the title itself, could only affect the proof of the title in a court of justice. To regain the title in such a case, where a conveyance is refused, recourse must be had to a court of equity. The language of the statute, which is essentially the same now that it was when the deed was destroyed, is: No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or con-

earning or in any manner relating thereto, shall hereafter be created, granted, or assigned, surrendered or declared, unless by act or operation of law, or by a deed of conveyance in writing: Comp. Laws, sec. 8177; or by last will and testament: sec. 8178.

Is defendant estopped from introducing parol evidence of title in Goodrich? We think he is, under the circumstances stated in the case. Secondary evidence cannot be received to prove a fact without first laying a foundation for it in accounting for the absence of that which is primary. The deed to Goodrich is the best evidence of title. That is not produced, and its destruction is accounted for in a way that shows it would be dishonest in him to claim anything under it. It was destroyed in pursuance of an agreement between him and his grantors after the purchase-money had been returned to him, with a view of revesting the title. It was done with his consent, and for a valuable consideration. The law will not recognize such a state of facts as an excuse for the non-production of the deed. Its language to Goodrich would be, if he was defending, Sir, you are estopped by your own acts from proving the contents of the deed by parol evidence,—and the defendant who claims through him has no greater rights than he.

The judgment of the circuit court must be reversed, and judgment be entered for the plaintiff for the land described in his declaration, with costs.

MARTIN, C. J., and CAMPBELL, J., concurred.

CHRISTIANCY, J., was absent.

NO PAROL ESTOPPEL CAN DIVERT ONE OF TITLE TO LAND: *McPherson v. Walker*, 50 Am. Dec. 200.

PERSON CLAIMING TITLE UNDER ONE ESTOPPED IS BOUND by the estoppel, though he claims *bona fide*, unless the estoppel is fraudulent: *McCreey v. Benson*, 54 Am. Dec. 194.

ALTERATION OR DESTRUCTION OF TITLE DEED DOES NOT DIVERT TITLE OF GRANTEE: *Van Hook v. Simmons*, 78 Am. Dec. 573, 574, note.

THE PRINCIPAL CASE IS CITED in *First Nat. Bank v. McAllister*, 46 Mich. 402, in support of the rule that one who has deliberately, and without any fraud or deceit being practiced on him, obtained an apparently legal transfer of land with intent for good reasons to have the legal title placed in some one else, cannot afterwards assail such transfer by parol evidence, and show the existence of a former deed to himself which he had suppressed, without recording, for the very purpose of having the land reconveyed.

NICHOLS v. LEE.

[10 MICHIGAN, 325.]

PAYMENT OF MORTGAGE BY AGENT FOR AND WITH FUNDS OF MORTGAGOR DISCHARGES MORTGAGE, although the agent, instead of having it discharged, causes it to be assigned to secure a debt owing by himself. In such case, neither the assignee nor one who takes an assignment from him can hold the mortgage as against the mortgagor or his heirs.

ASSIGNMENT OF MORTGAGE STANDS IN PLACE OF MORTGAGE, and any equities between such assignee and the mortgagor affect the mortgage in the hands of any subsequent assignee.

COMPULSION OF PETITION OF GUARDIAN UNDER MICHIGAN STATUTE (Comp. Laws, sec. 3099), for license to sell the lands of his ward, pointed out.

APPEAL in chancery. The opinion states the case.

G. V. N. Lothrop, for the complainant.

O. Hawkins, for the defendant.

By Court, **MANNING, J.** The bill is to restrain the foreclosure of a mortgage at law, and to have the mortgage canceled and discharged of record.

The mortgage was given by Mrs. Brown to Stockwell, assigned by Stockwell to Dillingham after it fell due; by Dillingham to Roberts, and by him to the defendant Lee.

The bill states the mortgage was paid by John Brown, the husband of Mrs. Brown, with means furnished him for that purpose by Mrs. Brown, on his undertaking to pay the mortgage and have it discharged of record. This, we think, is clearly proved by the testimony in the case. It further states that Brown, on paying Stockwell, instead of having the mortgage discharged, procured an assignment of it to Dillingham, to defraud the heirs,—children by a former husband of Mrs. Brown, who had in the mean time died. The answer states that the mortgage was purchased by Brown of Stockwell, and assigned by him, at Brown's request, to Dillingham, to secure a debt Brown was owing him. Dillingham, in his testimony, says it was assigned to him at Brown's request, to secure a debt of between twenty-five dollars and thirty dollars Brown was owing him, and to secure him for any further indebtedness that might accrue to him if he foreclosed the mortgage. There is no pretense he paid Stockwell anything, or that he furnished Brown with any part of what he paid Stockwell. We know of no principle in equity giving him, in such circumstances, rights superior to what he would have had, had Stockwell assigned to Brown, and then Brown to him. As against Brown

himself, the heirs of Mrs. Brown would have a clear right to have the mortgage canceled; and what they would be entitled to against him, they would be entitled to against his assignee, or the assignee of such assignee. The assignee of a mortgage takes it subject to all equities existing between the parties to it. Not between the mortgagor and mortgagee only, but between the mortgagor and assignee of the mortgagee who has assigned it to another. When a mortgage is assigned, the assignee, for all beneficial purposes claimed under it by him, becomes a party to the mortgage, and stands in the place of the mortgagee; and any equities between such assignee and the mortgagor affect the mortgage in the hands of his assignee.

As to complainant's interest in the mortgaged premises, and consequently his right to file the bill, it was argued that the guardian's deed of the three undivided fourths belonging to the minor heirs was void for want of jurisdiction in the probate court granting the license to sell, as the petition for the license did not comply with the statute.

The statute provides that in order to obtain a license to sell, the guardian shall present to the probate court of the county in which he was appointed guardian a petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale: Comp. Laws, sec. 3099. The petition describes the land; states that about thirty acres of it were under improvement, and that the balance of it was wild and uncultivated, and yielded no income to the minors. That it was necessary a portion of the proceeds of the land should be used to pay certain debts incurred in behalf of the minors, and that in the opinion of the petitioner it would be for their interest to have the land sold, and the proceeds, after paying the debts, put out at interest.

We think the petition complies with the requirements of the statute.

The decree dismissing the bill must be reversed, and a decree be entered for complainant in accordance with the prayer of the bill, with costs.

The other justices concurred.

DISCHARGE OR RELEASE OF MORTGAGE: *Smith v. Stanley*, 58 Am. Dec. 771; *Smith v. Durell*, 41 Id. 732; *Garwood v. Eldridge*, 34 Id. 195; *Wolfe v. Dowell*, 51 Id. 147; *Gale v. Mensing*, 64 Id. 197; *Perkins v. Sterne*, 76 Id. 72; *Perre v. Castro*, Id. 444; *Ladd v. Wiggins*, 69 Id. 551.

MORTGAGE IS DISCHARGED BY PAYMENT OF MORTGAGE NOTE BY DEBTOR OF MORTGAGOR, at mortgagor's request: *Bowman v. Manter*, 66 Am. Dec. 743.

PAYMENT OF DEBT EXTINGUISHES MORTGAGE WHICH IS SECURITY FOR IT: *McMillan v. Richards*, 70 Am. Dec. 655.

DISCHARGE OF MORTGAGE ENTERED BY MISTAKE in margin of record of mortgage in the registry of deeds does not prove an actual payment of the mortgage debt, nor cancel nor discharge the mortgage: *Bruce v. Bonney*, 71 Am. Dec. 739.

ASSIGNMENT OF MORTGAGE AND RIGHTS OF ASSIGNER: *Brown v. Blydenburgh*, 57 Am. Dec. 506, note; *Moff v. Clark*, 49 Id. 566; *Goddefroy v. Caldwell*, 56 Id. 300; *Perkins v. Sterne*, 76 Id. 72.

THE PRINCIPAL CASE IS CITED in support of the sufficiency of guardian's petition for license to sell the real estate of his ward, in *Ellsworth v. Hall*, 48 Mich. 411; and is cited to the point that the assignee of a mortgage obtains no greater rights than the mortgagee had, unless the mortgage was given to secure negotiable paper, when, if the assignment was made before maturity, he holds the paper and the mortgage discharged of pre-existing equities, in *Judge v. Vogel*, 38 Id. 569.

PORTER v. HENDERSON.

[11 MICHIGAN, 20.]

ACTION FOR SLANDER, FOR WORDS ACTIONABLE PER SE, CLAIMING GENERAL DAMAGES ONLY: *Held*, that the defendant could not show, in mitigation, under the general issue, that "during the six years prior to the suit, inveterate feelings of hostility had existed between the plaintiff and the defendant, and that the plaintiff had taken every opportunity to irritate the defendant."

DEFENDANT CANNOT GIVE IN EVIDENCE, IN SUIT FOR SLANDER, IN CHARGING PLAINTIFF WITH PERJURY, that the plaintiff called him "a liar and a perjured wretch," on an occasion not shown to have any connection with the matter in controversy.

IN ACTION FOR SLANDER, ALLEGING GENERAL DAMAGES ONLY, evidence is not admissible in mitigation that the plaintiff has stated that the slander did him no injury.

THE opinion states the case.

A. B. Maynard and A. C. Baldwin, for the plaintiff in error.
Crofoot and Dewey, and *O. I. Walker*, contra.

By Court, MARTIN, C. J. This is an action of slander, for words actionable in themselves. The declaration claimed general damages only, and the plea was the general issue. At the trial, it appears that the utterance of the words charged to be slanderous was proven, and that the defendant (plaintiff in error) offered testimony in mitigation of damages, which the court rejected, and upon the rulings and decisions of the circuit judge in rejecting such testimony error is assigned: 1.

That the court below "refused to allow evidence that during the six years prior to the trial, inveterate feelings of hostility had existed between the plaintiff and defendant, and that the plaintiff had taken every opportunity to irritate the defendant."

In this ruling there is no error. The declaration charges the defendant with the uttering of words imputing to the plaintiff perjury, in testifying upon the trial of an indictment against one Shipley and one Baker, and also of words imputing larceny. The trial of the indictment occurred in August, 1859, and the slanderous words are charged to have been spoken in the March following; and as the bill of exceptions furnishes no specific information of the times and occasions when the words were spoken, we can draw no inference that any of them were uttered before the trial; and indeed, as to those imputing perjury, it is clear that they must have been uttered after. "It is obvious that the purposes of justice require us to look as far as practicable to the conduct and motives of both parties in connection with the subject-matter of the grievance, in order to estimate fully and fairly the amount of damages sustained by the one, and of retribution which ought to be made by the other. If the plaintiff has been free from blame, and has been made the victim of the defendant's cool and deliberate malice, the case presented is widely different from one where the plaintiff, by his own misconduct, occasioned or provoked the injurious imputation." But I apprehend there must be either some misconduct or some provocation immediately occasioning the grievance, or so connected with it as to furnish to some degree a reason or excuse for it, to allow the act of the defendant to mitigate the damages the law would otherwise award for the injury. The proposition in this case was too broad, as it tended to show no immediate provocation or proper motive; but on the contrary, malice and inveterate hostility on the part of the defendant as well as on that of the plaintiff, for years prior to the alleged injury.

The plaintiff in error was rather benefited than damnified by the rejection of this offer, as the malice and hostility of the one afforded no excuse for that of the other, nor was the continued inveterate hostility of the one a provocation sufficient in the eye of the law to justify retaliatory hostility, or to mitigate damages for an unjustifiable and unprovoked injury. The offer of the plaintiff in error was, in reality, to show that he was moved by vindictiveness to utter the alleged slander. This is neither a justification nor an excuse in ethics or in law

for a wanton wrong. General evidence that the plaintiff had been in the habit of slandering the defendant is inadmissible to mitigate damages for slander deliberately uttered: *May v. Brown*, 8 Barn. & C. 113; *Cornwall v. Richardson*, Ryan & M. 305; much more, I think, would be the testimony offered in this case, which tended to show mutual hostility, but no overt act or immediate provocation for the slander. It is only in cases where the provocation is so recent as to induce a fair presumption that it occasioned the utterance of the slanderous words, and that they were spoken during the continuance of the feelings excited by such provocation, that evidence of provocation can be admitted for the purpose of mitigating the damages which would otherwise be assessed for the injury done: See *Child v. Homer*, 13 Pick. 503; *Beardsley v. Maynard*, 4 Wend. 836; S. C., 7 Id. 560.

It is secondly assigned as error that the court refused to permit the defendant to prove that on the occasion of a trial at Thornville, before a justice of the peace, the plaintiff called him a liar and perjured wretch. The foregoing reasons are applicable to show that there was no error in this ruling. But a further reason arises from the indefiniteness of the offer. The affair at Thornville is not shown to have any connection with the alleged grievance, or as having been any provocation to it. It appears to have been offered as evidence of hostility, or as a justification for retaliatory words, spoken, perhaps, long afterwards. In no light can I view the evidence as proper.

The last error assigned is upon the refusal of the court to allow Townsend to testify that the plaintiff had stated that the statements of Porter did him no damage. I can see no error in this ruling. The elements of redress in an action for slander are the wrong done to the plaintiff, and the malice or vicious intent of the defendant; and where no special damages are alleged, the jury are left to determine the amount of damages according to the character and enormity of the injury; and they are assessed as retributory rather than compensatory. Consequently, although the plaintiff may have declared that the words did him no injury, yet the jury might have thought the conduct of the defendant such as to demand exemplary damages; and they would not be bound by such admission. Had the plaintiff claimed special damages, or that he sustained any special injury, so that damages might be said to be the sole object of the suit, as it is said they are in *Richard-*

son v. Barker, 7 Ind. 567, then, undoubtedly, his statement that he has sustained no special damage or injury would be competent evidence to go to a jury in mitigation of damages, and perhaps in bar of the action. But from the utterance of words actionable in themselves, the law conclusively presumes some damage to have resulted, and through the intervention of a jury assesses the damages according to the nature and character of the grievance; and if special damages be not alleged, those given by the verdict may be said to be retributory, and not compensatory. The idea of compensation does not arise, for no standard for determining the amount of injury is given. But it was argued that the admission should be received as the declaration of a party against his own interest; and *Richardson v. Barker*, 7 Ind. 567, is relied upon in support of this proposition. To the authority of that case I do not yield. I do not well see how such an admission, if made, can be regarded as a declaration against a party's interest which would bind him. It is but an expression of opinion as to the effect of the grievance, and as such can have no binding force. Those declarations and admissions which bind the party making them, and which he is estopped to deny, are declarations or admissions of facts by which the rights of others may be affected, and must be made with a purpose of affecting or influencing the judgment or action of another. But the loose conversations of one respecting the effect of a particular act upon himself can affect no right of any other party, and consequently cannot be binding upon any one.

The case of *Evans v. Smith*, 5 T. B. Mon. 363 [17 Am. Dec. 74], is referred to as sustaining this allegation of error. But this decision rests upon a very different principle, and of its correctness I have no question. That was slander of the wife, and evidence showing that the husband had said he did not believe that the defendant originated the report against his wife, and that he had merely related what he had heard, but that it was necessary to sue somebody to stop the report, was held admissible in mitigation of damages, as it went to the circumstances of the slander, and the motives of the defendant, and to the question of malicious intent, as well also as to the object in bringing the suit. But the effect of the slander was not involved in the admission, nor so considered by the court. It introduced no new rule of damages; while the proposition of the defendant in this case, if allowed, would tend to establish this rule. The fairer the character of the

plaintiff, the less the injury, and consequently the smaller the damages to be given. Such a rule cannot be tolerated.

The judgment is affirmed.

The other justices concurred.

EVIDENCE IN ACTIONS FOR SLANDER: *Moore v. Olay*, 60 Am. Dec. 461, and note; *Ware v. Cartledge*, Id. 489, note 494; *McIntire v. Young*, 39 Id. 443; *Stallings v. Newman*, 62 Id. 723; *Hawks v. Patton*, 63 Id. 266; *Jellison v. Goodwin*, 69 Id. 62; *Hosley v. Brooks*, 71 Id. 252; *Sheffell v. Van Deusen*, 77 Id. 377.

WHEN WORDS ARE ACTIONABLE PER SE: *St. Martin v. Demoyer*, 61 Am. Dec. 494; *Smith v. Silence*, 66 Id. 137; *Abrams v. Foshee*, Id. 77.

THE PRINCIPAL CASE IS CITED to the first point stated in the syllabus, in the "analogous case" of *Downey v. Dillon*, 52 Ind. 451.

LARKIN v. COUNTY OF SAGINAW.

[11 MICHIGAN, 32.]

COUNTY IS NOT LIABLE FOR ACTS OF ITS BOARD OF SUPERVISORS in exercise of their legislative power.

BOARD OF SUPERVISORS EXERCISE LEGISLATIVE POWER IN PROVIDING FOR ERECTION OF BRIDGE at the expense of the county, and the county is not liable for an injury to an individual caused by a defect in the plan of the bridge. The same rule controls in such case as would apply had the bridge been built by authority of the legislature.

ACTION against county of Saginaw and one Hughes for obstructing the navigation of a certain river, by the improper construction of a bridge. The board of supervisors of the county voted a sum for the erection of the bridge, by resolution declared its erection necessary, and appointed a committee of their number to cause it to be erected upon a plan to be adopted by them. The work was let to the lowest bidder, and performed under the personal inspection of the committee, and by them accepted when completed. Plaintiffs gave evidence to show that the bridge was defectively constructed, and that in consequence they had sustained special injury. Verdict against Hughes, to whom the job for constructing the bridge was let, but in favor of the county. Plaintiffs brought error.

Moore and Gaylord, for the plaintiffs in error.

Sutherland and Müller, for the defendant in error.

By Court, MARTIN, C. J. The board of supervisors of Saginaw County is clothed with legislative as well as executive

power; and while the county may be made liable for its acts in the exercise of the executive, it cannot for its exercise of legislative power. The determination that it was necessary to build a bridge across the Tittibawassee River, and the whole action of the board in relation thereto, were legislative, and whether any portion was usurpation or not, no action can be maintained against the county for any consequences resulting therefrom. What would be a nuisance if erected by an individual is not such when erected by authority of law and by the public, so as to confer a right of private action against the public therefor; and the same principle, I think, controls in this case that would, had the bridge been built by authority of the legislature.

The judgment of the court below is affirmed.

The other justices concurred.

MUNICIPAL CORPORATION IS NOT GENERALLY LIABLE FOR NEGLIGENCE OF ITS OFFICERS: See *Mitchell v. Rockland*, 66 Am. Dec. 252; *Patch v. City of Covington*, Id. 186; *Dargan v. Mayor etc.*, 70 Id. 505; *Peck v. City of Austin*, 73 Id. 261.

LIABILITY OF MUNICIPAL CORPORATION FOR INJURIES resulting from failure to repair streets, sidewalks, etc.: See *Eric v. Schwingle*, 60 Am. Dec. 87, 90, note; *Hutson v. Mayor etc.*, 59 Id. 526; *Raymond v. City of Lowell*, 59 Id. 57.

FAILURE TO EXERCISE POWER vested in a municipal corporation by a statute does not render such corporation liable for damages occasioned by such failure: *Carr v. Northern Liberties*, 78 Am. Dec. 342, 347, note.

THE PRINCIPAL CASE IS CITED in support of the general rule that no action will lie against a municipal corporation or body for an injury resulting from a lawful exercise of its legislative authority, in the following cases: *Pontiac v. Carter*, 32 Mich. 170; *McOutcheon v. Homer*, 43 Id. 486; *McArthur v. Saginaw*, 58 Id. 359; *Symonds v. Olney County*, 71 Ill. 357. It is cited and distinguished in *Detroit v. Blackley*, 21 Mich. 106, where it was, however, held that the city of Detroit was not liable to a private action, by an injured party, for neglect to keep a cross-walk in repair. Cooley, J., dissenting.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

DAVIS v. PIERSE.

[7 MINNESOTA, 12.]

RIGHT OF OFFICERS TO PROSECUTE AND DEFEND ACTIONS AND OTHER JUDICIAL PROCEEDINGS CANNOT BE ABROGATED or even suspended; this right being guaranteed both by section 8 of the Minnesota bill of rights, and by section 2 of article 4 of the constitution of the United States.

ACT SUSPENDING PRIVILEGE OF PROSECUTING AND DEFENDING ACTIONS AND JUDICIAL PROCEEDINGS, as to persons aiding the rebellion against the United States, is unconstitutional and void.

In this case, after complaint, answer, and reply were filed, and issue joined, defendants Wilcox and Barber served a supplemental answer alleging that plaintiff was a citizen of Mississippi, and that that state was in rebellion against the United States. Plaintiff demurred to the supplemental answer, which demurrer was overruled by the court, and plaintiff appealed.

Van Etten and Officer, for the appellant.

D. Cooper, for the respondents.

By Court, **EMMETT, C. J.** As this case is presented to us, the only question necessary to be considered is as to the constitutionality of an act of our legislature, passed February 14, 1862, and entitled "An act suspending the privilege of all persons aiding the rebellion against the United States, of prosecuting and defending actions and judicial proceedings in this state." We have had the benefit, in this and other cases since heard, of three distinct and elaborate discussions of this ques-

tion, each time by different and learned counsel, have taken ample time to consider the various arguments offered, and have endeavored to give each its due weight. We do not propose, however, to discuss the several propositions had under consideration, but rather to state the conclusion to which we have arrived, with some of the reasons which led to it.

The act was doubtless intended to be in aid of the general government, then and still engaged in efforts to put down a most gigantic and causeless rebellion. It was but natural, at such a time, that every patriotic citizen should feel that any one engaged in this traitorous attempt to dismember the republic ought not still to enjoy privileges secured to him only by that government which he has renounced, and is striving to subvert; and especially that he should not be permitted, by the aid of our courts, to take of the substance of the people of the loyal states, to be afterwards used by him in support of the rebellion. Hence the legislature was readily induced to pass an act which, while it visited those who had already engaged in the rebellion with certain disabilities, might, by the powerful motive of self-interest, restrain others from following their bad example. Still, the very fact that the act was passed under such a state of excitement admonishes us of the necessity of carefully examining its several provisions, lest in our anxiety to punish the guilty authors and abettors of our national troubles, we do far greater injury to ourselves by forgetting justice, and disregarding the wholesome restraints of our fundamental law.

If the state of governmental affairs were always peaceful and quiet, and legislation never attended with undue excitement, many of the restrictions imposed by constitutional governments upon legislative power might be dispensed with as unnecessary; but it is precisely because emergencies will arise which, for the time, seem to demand or justify a resort to radical and extreme measures, that these various inhibitions are declared in the fundamental law; and as extraordinary acts of legislations are seldom resorted to, except when the public exigencies seem to demand them, it may truly be said that these provisions are inserted in constitutions for the very purpose of meeting this plea of necessity. Hence the greater the seeming necessity or popular demand for such legislation, the greater the danger to be apprehended from yielding to it; and the more inoperative the obligation on the part of the courts to square it rigorously, by the constitution—as no act in conflict

with that instrument can ever become a law, however just, abstractly considered, its provisions may be, or however great and immediate the apparent necessity for such an enactment.

Now, when we recur to our state constitution, we find that the bill of rights expressly declares that no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in active service: Sec. 7.

It also declares every person to be entitled to a "certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character," and that he shall obtain justice "promptly and without delay, conformably to the laws": Sec. 8.

It also prohibits the legislature from passing any *ex post facto* law, or any law impairing the obligation of contracts: Sec. 11.

And yet it may be said that the act under consideration contravenes each of these provisions or declarations in one form or other. As before remarked, this suspending of the right to maintain or defend an action, or other judicial proceeding, is in the nature of a punishment for rebellion; and yet this punishment or penalty, by the terms of the act, can be inflicted without presentment or indictment, or trial, such as the constitution requires. The statute applies in terms as well to acts of rebellion committed before its passage as to those committed afterwards; and in respect to the former, it is clearly *ex post facto*. And in so far as it denies a remedy on contracts made with certain persons, or in which such persons are interested, it may be said to impair their obligation, as well as withhold a constitutional privilege. It is admitted that the term "every" as used in connection with the word "person" in said section 8, is not to be taken in its broadest sense, as that would include aliens, enemies, as well as friends. It is not to be presumed that it was the intention to throw open our courts to alien enemies, or to extend privileges to alien friends, other than those already accorded by comity among civilized nations. The section was intended for the benefit of, and we think should be limited in its application to, the people of the state, or at most to such persons as are within its limits, and subject to its laws; all others might be denied the privilege of our courts without depriving them of an absolute right. Even the citi-

sens of other of the United States could not demand this privilege as a right, were it not for a provision of the constitution of the United States, hereinafter recited. Let us, therefore, first inquire whether, under any circumstances, or for any cause whatsoever, a citizen of Minnesota can be rightfully deprived of the right thus guaranteed to him by the constitution of the state, and then as to the citizens of other states.

The section, within the restriction above admitted, applies to all without exception. "Every person," is the language made use of, and if there was to be an exception it would doubtless have been noticed. And why, it may well be asked, should there be an exception? Why should simple justice, as against another, be denied to any citizen, however fallen, degraded, or guilty he may be? The chief end of government is the protection of the rights of all,—the bad no less than the good,—and even without a constitutional provision, every member of society may rightfully claim protection of his person and property. To deny it to any one member of society is an injury to community at large, and none the less so though the sufferer may have committed crimes worthy of imprisonment or death.

We would never for one moment suppose that the legislature has the power under the constitution to deprive a person or class of persons of the right of trial by jury, or to subject them to imprisonment for debt, or their persons, houses, papers, and effects to unreasonable searches; or their property to be taken for public use without just compensation; and yet neither of these is more sacred to the citizen, or more carefully guarded by the constitution, than the right to have a certain and prompt remedy in the laws for all injuries or wrongs to person, property, or character.

An attempt was made, and supported by an ingenious argument, to weaken the force of this objection by drawing a distinction in regard to the punishments which might be inflicted between ordinary crimes, and those which, like treason and rebellion, strike at the very foundations of the government; but such distinction is not found in the constitution, nor do we think any such was ever contemplated. We think that the framers of the constitution intended that there should be no exception to the rule declared in the eighth section of the bill of rights, and are of opinion that to admit of one would not only be violative of every principle of justice, but wholly beneath the dignity of a free government. This is a mere ques-

tion of legislative power under the constitution, and if we once admit that even the rebel or traitor can, in the face of the constitutional provision so often referred to, be deprived of the privilege of suing and defending in our courts, the same consequences may, in the discretion of the legislature, be visited upon criminals of every grade; for there is no line at which the law-making power can be stopped, if once permitted to pass that prescribed by the fundamental law.

But, it is urged, this act does not take away this privilege entirely, it only suspends it during the continuance of the rebellion. The legislature itself seems to have been fully aware of the want of power wholly to deprive the rebel of a right guaranteed to him by the state constitution, and hence the attempt to accomplish by indirection that which could not be done directly. The course it was found necessary to pursue in framing this act in order to effect the object, is of itself such an admission of a want of power to take away the privilege, that we should not have thought it necessary to discuss the question, had it not been urged on the argument, with apparent seriousness, that the legislature has this power in certain cases.

Now, aside from the fact that the suspension, even of this privilege, for any length of time, might be considered wholly inconsistent with the right to have justice "promptly and without delay," we hold, in any event, that the suspending of the right for so indefinite a period, as "during the continuance of said rebellion," is equivalent to denying it altogether. Had the right to sue merely been suspended until the party returned to his allegiance, it might have been claimed with a semblance of reason, that although the time was indefinite, yet as it was in his power to make it definite, and to reinstate himself in the full enjoyment of his privilege at any time, by his own act alone, a party was in no wise injured thereby. But to suspend, as this act does, not only the right to maintain an action, by any one engaged in the rebellion, but even his right to defend, when brought into our courts by others, until those who are or may be controlling the rebellion, and over whom he may not possess a particle of influence, shall cease their efforts to overthrow the government, is so indefinite and uncertain as to be altogether indefensible in any view which we have been able to take of the subject. Nor can we adopt the suggestion repeatedly urged, that this statute might be treated as merely imposing terms upon litigation; because

whenever terms are admissible they must be reasonable, and not inconsistent with the free and prompt administration of justice; but here, as we have seen, it is put utterly without the power of the party to reinstate himself in his privilege, except upon the terms of putting a stop to a rebellion in which millions of people are involved.

We are clearly of opinion, therefore, that so far at least as the citizen of this state is concerned, the act cannot apply, because the legislature cannot, directly or indirectly, for any cause whatsoever, deprive him of his constitutional right to commence, maintain, or defend any action or other judicial proceeding.

Here, however, another question is presented: Cannot the statute be made to apply to those who are citizens of other states? The constitution of the United States seems to settle this question at once. Section 2, article 4, declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." We have endeavored to show that the citizens of this state are not affected by this act, and it seems to follow, necessarily, from the clause just recited that the citizens of the other states are equally exempt.

We do not hold that this clause authorizes every one whom either of the states may recognize as a citizen, or may elevate to state citizenship, to demand in every state of the Union all the privileges and immunities accorded to any of its citizens. Thus construed, the negro citizen of Massachusetts, after residing in this state four months, might insist on the right to vote, although we do not extend that privilege to our own negroes; on the other hand, by conferring citizenship on our savage Indians, we might supply other states with another class whom they would be bound to admit to all the privileges which their own citizens of whatever class enjoy. In this way the naturalization laws passed by Congress would be completely nullified; for the citizens of each state would become, in effect, citizens of the United States; and the lowest standard of citizenship which any state might adopt would, so far as her citizens were concerned, be substituted for that prescribed by Congress. The clause will not, in our opinion, admit of any such construction. Properly interpreted, we are by no means sure that the word "citizens," as therein used, means other than citizens of the United States. The main object of the section was to prevent each state from discriminating in favor of its own people, or against those of any other,

by securing to each citizen of the government then being formed (and to none other, as we believe) certain fundamental rights, privileges, and immunities, wheresoever in the United States he might demand them, and to which individual state soever he might belong. Not absolute equality of rights and privileges with every citizen of each state of the Union, but all such privileges and immunities in any state as are, by the constitution and laws thereof, secured or extended to her own people of the same class, and otherwise similarly situated. Such an interpretation would, it is confidently believed, furnish an easy and satisfactory solution of many troublesome questions,—would afford all the protection needed by the people, and secure every other end sought to be accomplished by the section. But however liberal or confined the interpretation and construction may be, there can no longer be any doubt that it covers the present case; for it has already been decided that among the privileges in which the citizen of every state is secured by this section, that of instituting and maintaining actions of every kind in the courts of every other state is included: *Corfield v. Coryell*, 4 Wash. C. C. 380, 381.

There appears to be but one way in which this act can be made to apply to citizens of other states, and that is, to hold and treat them as alien enemies. But this view cannot for one moment be tolerated, because it involves either an admission of the right of a state to secede from the Union, or that the rebellion has become a revolution. So long as the government of the Union treats the revolt of certain states as a rebellion, and continues its efforts to reinstate the federal authority, we must treat their several ordinances of secession as nullities merely, and recognize and respect every right and privilege which the people of those states may have as citizens of the United States. While the government is striving to maintain the supremacy of the constitution, it becomes every loyal state to acknowledge and respond to every obligation which that instrument imposes. We cannot, therefore, consistently treat every attempt of a state to withdraw from the Union as of no validity whatever, and at the same time hold the citizens thereof in any degree accountable for the action of their state. Unless they are absolutely shielded from the consequences of their rebellion, by state action, they should in no wise be prejudiced thereby. And yet, while the federal government treats as wholly unauthorized and void the so-

called secession ordinances of every state, and repudiates every defense of individual action founded thereon,—while it still regards the people of those states as citizens, and asserts the right to punish their revolt as rebellion, the enactment before us affects to treat them as alien enemies, for the purpose of depriving them of rights which they enjoy as citizens of the United States, and to that end draws distinctions to their prejudice between them and the citizens of other states, founded solely on the action of their state.

The number of instances in which, of late years, statutes have been declared unconstitutional, is sometimes referred to as if the fact were to be regretted; but this proves nothing (unless the decisions are shown to be wrong), except, perhaps, that legislation is not so carefully conducted as formerly. It sometimes happens, we fear, that legislators resolve all doubts in favor of enactments, which seem to be demanded by the occasion, or by the current of popular sentiment, relying upon the courts to apply a remedy, if it should be found, on more careful examination, that the legislature had no authority to pass such a law. This fact serves to explain to some extent why questions touching the constitutionality of statutes are more frequent of late than in former years. But however often such questions are presented, it is the duty of the courts to meet and decide them; and let us hope that all encroachments upon the fundamental laws of the state and nation may ever be faithfully and successfully resisted.

We have not a doubt of the unconstitutionality of this act, so far as it is intended to be applied to the people of this state, or to the citizens of the other states; and although many patriotic citizens may regret, for the moment, that the state and federal constitutions stand in the way of an enactment which might aid, however feebly, in restoring the supremacy of the Union, yet, in the end, all must regard as matter of pride and gratulation, that in this state no one, not even the worst of felons, can be denied the right to simple justice.

The order overruling the demurrer is reversed, and the supplemental answer, and all subsequent proceedings founded thereon, are set aside.

THE PRINCIPAL CASE WAS FOLLOWED IN *Wilcox v. Davis*, 7 Minn. 23, 24, 28; *Keough v. McNitt*, Id. 31; *Jackson v. Butler*, 8 Id. 117, where the same questions were raised.

LEWIS v. BUCK.

[7 MINNESOTA, 104.]

PLEA IN REPLEVIN THAT DEFENDANT IS UNITED STATES MARSHAL, and holds the property by virtue of a levy under an attachment from the United States district court, is, if not denied, a conclusive defense to an action in a state court.

ONE COURT CANNOT TAKE PROPERTY FROM CUSTODY OF ANOTHER by replevin or any other process.

PROPERTY HELD BY UNITED STATES MARSHAL UNDER WRIT FROM DISTRICT COURT cannot be taken from him by any process from a state court; and if surrendered upon a writ of replevin, the state court having custody of the property will order its return upon demand, and a showing by the marshal of his authority for holding it.

THE facts are stated in the opinion.

J. and C. D. Gilfillan, and John M. Gilman, for the appellant.

Allis and Peckham, for the respondent.

By Court, **ATWATER, J.** The plaintiff Lewis brought an action of replevin, alleging title and right of possession in the plaintiff, and a wrongful taking and detention by the defendant. The answer denies the allegation as to title and right of possession, and then alleges that defendant, being United States marshal, and having in his hands a writ of attachment from the United States district court against one Edmund W. Lewis, levied upon the property as the property of said Edmund W., and demands judgment for a return, or the value of the property. There was no reply.

On these pleadings, upon defendant's motion, the court ordered judgment for defendant, for a return of property, or the value thereof, which judgment was entered. From this judgment, plaintiff appeals. These facts we understand to be admitted by the parties, as no paper, book, or certified record of the case has been furnished to the court.

The first proposition of the appellant is to show that defendant's right to judgment for a return or the value does not follow of course upon his right to judgment. That the claim for a return of the property named in section 10, Compiled Statutes, page 566, is not a bare demand in the answer, but it must be a demand based upon facts showing the right of possession in defendants, and before a return can be ordered, the court must adjudge such facts to be sufficient to entitle defendant, in law, to the possession.

This position we think correct. Under the plea of *non cepit*, in the former action of replevin, where the title or right of the plaintiff was not denied, the defendant was not entitled to a return of the property. That plea, in substance, disavowed all connection with the property, and made no claim to it, and if the defendant succeeded upon it, he was entitled to a judgment of costs only. The name and form of the action only, under the code, is changed; and where the defendant, denying the wrongful taking or detention, establishes substantially the same facts as would entitle him to a judgment for costs under the plea of *non cepit* under the former system, the judgment should be the same under the code. And it is undoubtedly true that all pleas in justification of the alleged wrongful taking or detention, must show either a better, or at least as good, a right to the possession in the defendant as in the plaintiff. And it must, therefore, follow that the defendant in this case cannot have judgment for the return or value of the property, unless the new matter in the answer shows that when the suit was commenced the defendant was just as much, or better, entitled to the possession than the plaintiff. The gist of the action is to determine which of the parties is entitled to the immediate possession of the property.

This leads us to inquire whether the new matter set up in the answer (and which stands admitted for want of a reply) does entitle the defendant to a return of this property. Upon this question, it is claimed by respondent that the decision of the United States supreme court, in the case of *Freeman v. Howe*, 24 How. 450, is conclusive. If the question of the validity and conclusiveness of the new matter here set up as a defense rested, or was to be determined, upon general legal principles, and was to be regarded as an open question, I think there are but few jurists who would not unhesitatingly declare that the facts stated, if admitted, constituted no defense. The proposition that an officer of any court, with a writ against A, may seize the property of B, and by simply alleging that he seized it under such writ as the property of A, may claim immunity against such illegal seizure, at least in any other court than that which issued the writ, strikes the mind, at first blush, as being not only a novel legal principle, but one conflicting with all our preconceived ideas of right and justice, as well as of the protection to which the citizen is entitled in his rights of person and property. And so we find that long since that eminent jurist, Chancellor Kent, laid it

down as an elementary and fundamental principle, that "if a marshal of the United states, under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person and the property so illegally invaded": 1 Kent's Com. 410. And the doctrine that this new matter must constitute a complete bar to the action would seem none the more tenable, whether it be based upon the ground of want of jurisdiction in the state court to entertain the action, or that, having jurisdiction, the plea constitutes, if not denied, a complete and perfect defense to the action.

Nevertheless, we think the case of *Freeman v. Howe*, 24 How. 450, clearly decisive of this question. That case is, in every respect, entirely analogous to this, and the plea there was, in substance, exactly the same as is here interposed, and the judgment of the state court overruling the plea was in that case held erroneous and reversed. And the case holds that no novel doctrine was established by the decision in that case, nor was there any departure therein from other rulings of that court in like cases. However this may in fact be, we cannot think that jurists and courts have generally understood the decisions of that tribunal to have gone to the same extent, at least, as in *Freeman v. Howe*, 24 How. 450. The remarks of Chancellor Kent, above quoted, and the decision of the supreme court of Massachusetts, in the recent case of *Freeman v. Howe*, *supra*, and other cases that might be named, confirm this view. This, however, is immaterial to the proper disposition of this case. Whatever doubts may have hitherto been entertained upon the subject, none can now exist, but that the supreme court has distinctly decided in that case that such a plea as is here interposed is a bar or complete defense to the action in the state court, and that the plaintiff must resort to the United States court to contest his right of property. If we correctly understand the decision, it is based upon the sole ground that "one court cannot take the property from the custody of the other by replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice." Whether this evil may be greater than that of always compelling a party in these cases to resort to the court out of which the process issued, upon which his property has been seized, to assert his legal rights, may well be questioned. It is, however, unnecessary and useless to discuss that question here. The supreme court of the United

States having the final disposition of this question and this case, it only remains for this court to apply the law, as stated and held by that court, to the case at bar.

It is only necessary, therefore, further to consider whether there was any error committed by the court below, in rendering judgment for the return of the property to the defendant. The case of *Freeman v. Howe*, 24 How. 450, does not directly decide this question, as nothing is said in that case as to the disposition of the property, consequent upon a reversal of the judgment of the state court, upon this plea. The proper determination of this question, in my judgment, depends upon what ground the United States supreme court reversed the decision of the state court. It is contended by appellant that it was upon the ground that the state court had no jurisdiction of the case whatever; that the replevin process was entirely void, and the plaintiff took nothing by virtue of it; and that the United States marshal, in delivering or permitting the sheriff to take this property under that process, did so voluntarily, and cannot claim the aid of this court in regaining possession of the same. If the premises of appellant are correct, it would seem that his conclusions must legitimately follow. I cannot see how it can consistently be claimed that the state court has no jurisdiction in the matter, either of the person or property; that the process by which the latter was seized was a nullity, and by virtue of which the plaintiff acquired and could acquire no rights whatever, and yet, that such court has the right to render final judgment, disposing of the property to all intents and purposes, as fully and completely as it could do, in a case where it has full power to adjudicate upon the same. I understand that by the lack of jurisdiction is meant the want of power in a court to determine upon the respective rights of the parties in regard to the subject-matter in dispute. And yet, when the main question at issue in the case is as to who is entitled to the immediate possession of the property, it is claimed that the court may have jurisdiction to decide that issue alone; that is, to decide upon the defendant's rights, while it cannot examine the right of the plaintiff. It would seem that the mere statement of such a proposition must show its absurdity, and that it can be sustained neither by reason nor authority.

It cannot be denied that there are expressions and statements in the opinion, in *Freeman v. Howe*, 24 How. 450, which would lead to the conclusion that the court, in that case,

reversed the decision of the state court, upon the ground that that court had not jurisdiction of the case; but upon a careful examination of the opinion, we cannot think that the court intended to base its decision upon that ground, but rather upon that of a conflict of jurisdiction or authority between the courts. And such must have been the understanding of the reporter of the case, as appears from the *syllabus* of the points decided. In referring to the case of *Taylor v. Carryl*, 20 How. 588, it is stated that a majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a state and federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question which jurisdiction had first attached by the seizure and custody of the property under its process; and that this principle is equally applicable to the case of property attached under *meane* process, for the purpose of awaiting final judgment, as in the case of property seized in admiralty, and the proceedings *in rem*. Here is not only no denial of the inherent jurisdiction of the state court to determine the action, but a recognition of it. But it is also held that, as another court had jurisdiction of the subject-matter of the action, and which had first attached, that court should determine the issues between the parties. And, indeed, the state court in fact has jurisdiction of both the subject-matter and person of the defendant, both being within the territorial limits over which the jurisdiction of the court by law extends, and neither being exempt therefrom by any special provision of law or otherwise.

The plea is neither in terms nor substance one to the jurisdiction of the court, but going directly to the merits of the action as alleging facts for the consideration of the court, and upon which it is to determine who is entitled to the immediate possession of the property, which, as above stated, is the gist of the action. In other words, it alleges facts which, by an arbitrary rule of law, arising out of the peculiar relations which the federal and state courts sustain to each other under our system of government, constitute a conclusive defense to the action. By the operation of that rule of law, it shows a better right in the marshal, as the representative of the United States court, to the possession of the property for the time being than in the plaintiff, who must submit the custody of

the property to that court until his right can be determined therein. We think, therefore, that there was no error in the court below, in rendering judgment for a return of the property or the value thereof.

There is another consideration which has a bearing upon this question. If it be admitted that the marshal has the right of possession under his seizure, then he has the right to resist the seizure by the sheriff, and may forcibly repossess himself of the property at any time. This court now has possession of the property, and the control thereof, and it would be an anomaly in the law to concede that another court has the right of, and is entitled to the possession, and yet refuse to restore the possession. The effect of this course would be practically to deny the right which is conceded in theory, and in no wise tend to diminish that embarrassing conflict in the administration of justice, which it seems to have been the main purpose of the decision to avoid. Conceding therefore the correctness, or at least the binding force, of the decision in *Freeman v. Howe*, 24 How. 450, we think the judgment in such a case must necessarily be for the return of the property to the defendant, and have no doubt but that the United States supreme court will so determine whenever the question shall be directly presented to that tribunal for adjudication. In *Ableman v. Booth*, 21 Id. 506, will be found a further discussion of the principles herein referred to, and from the reasoning of the court in that case, as well as those above cited, but little, if any, doubt can be entertained of the proper judgment to be rendered.

The judgment below must be affirmed.

REPLEVIN WILL LIE IN STATE COURT AGAINST UNITED STATES MARSHAL for goods wrongfully seized under process. So held by a divided court: See note to *Wilson v. Mackenzie*, 42 Am. Dec. 58. But see note to *Giltman v. Wilkams*, 76 Id. 223, on this point. In determining questions of federal cognizance, state courts ought to adopt and be governed by the rules of decision adjudicated in the supreme court of the United States: *Baxley v. Linah*, 55 Id. 494. But state laws are not binding upon the officers of the federal government, and a sale made by a United States marshal will be deemed valid until set aside by the federal court: *Kennedy v. Shepley*, 57 Id. 219, and note 223, referring to cases showing the jurisdiction of state courts over acts of United States marshals. On this point, see also *Buck v. Colbath*, *post*, p. 91.

THE PLEA SET UP IN THE PRINCIPAL CASE was substantially the same as that interposed in *Buck v. Colbath*, *post*, p. 91. An action of "claim and delivery," called in common parlance "replevin," is governed in the main by the same rules as the action of replevin. But in replevin, the right of immediate possession of the property sought to be recovered was a *sine qua non*, and so it is in the action of claim and delivery: *Berthold v. Holman*, 12 Minn. 347.

LYND v. PICKET.

[7 MINNESOTA, 134.]

IN ACTIONS FOR DAMAGES FOR WRONGFUL LEVY ON PROPERTY EXEMPT BY LAW, a selection of and demand for the property as exempt, and refusal by the officer, need not be proved by plaintiff to entitle him to recover, in a case where the property levied on is a separate and distinct article expressly exempted by statute, nor in any case, except where the exempt property is mingled with other of the same kind not exempt, or where the debtor's property is so situated that the officer cannot know that it is exempt.

FACT ALLEGED AND PROVED, THAT OFFICER SEIZED ON PROCESS property which he knew to be exempt, may be considered by the jury in aggravation of damages in an action for the wrongful levy.

MALICE IN LEVY ON PROPERTY EXEMPT BY LAW is as fully expressed by a taking with knowledge that the property is so exempt as it would be by a refusal to deliver the property after it had been demanded as exempt.

DEMAND FOR EXEMPT PROPERTY SEIZED ON PROCESS, when necessary in order to enable the plaintiff to recover, need not be made at the time of the seizure by the officer, but should be made within a reasonable time, which must depend upon the circumstances of each particular case.

ADMISSION OF IRRELEVANT TESTIMONY AFTER OBJECTION THERE TO will not be sufficient ground for setting aside a verdict, unless it appears or may reasonably be intended that the evidence has prejudiced the complaining party.

REJECTION OF COMPETENT EVIDENCE AND EXCEPTION TO RULING will not be ground for setting aside the verdict, or for a new trial, if the party excepting is afterwards allowed to and does introduce evidence of the same fact.

SIMPLE DENIAL THAT PROPERTY WAS OF VALUE ALLEGED IN COMPLAINT, where the question of value is material, is insufficient, and amounts to the pleading of a negative pregnant. The pleading should allege that the property is of no value, or should state the value as defendant claims it.

ATTACHMENT. The opinion states the facts.

R. A. Jones, for the appellant.

Ripley, Wells, and Cavanaugh, for the respondents.

By Court, *ATWATER, J.* The first objection raised by defendants upon the trial of this action, is that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges that on the 16th of November, 1859, he was the owner and in possession of one span of horses, double set of harness, and neck yoke, of the value of \$267, which property was exempt by law from attachment or execution, it being the only team and tackle therefor owned by the plaintiff; that Picket was sheriff of the county of Fillmore, and on said day defendant Jones sued out a writ of attachment, from the

district court of said county, against the property of the plaintiff not exempt from execution, in an action then pending in said court, in which Jones was plaintiff, and this plaintiff defendant; that said Jones, well knowing said property was exempt, on said day placed the writ in the hands of the deputy sheriff, and directed him to attach the property; that said deputy did wrongfully attach and take into his possession said property, and delivered the same to defendant Jones at his request. The complaint then alleges a demand of the property, and wrongful detention by the defendants.

Section 99, page 570, Compiled Statutes, provides that "no property hereinafter mentioned or represented, shall be liable to attachment, execution, or sale, or any final process from any court in this state." The appellants contend that the word "or," above quoted, should be "on," and that the word as printed is a typographical error. As the word used makes sense in the connection in which it is employed, and as we have no evidence that the error alleged really exists, we must take the language as we find it in the statute. If the construction claimed by appellants be correct, and the property specified be only exempt from attachment and sale on final process, then the converse of the proposition might be urged with much force, that the property specified is liable to attachment and sale on mesne process, which, if true, would greatly limit the benefits which it would seem the law intended to confer upon the debtor.

This statute then provides that certain property shall not be liable to attachment, execution, or sale. What is the liability here spoken of? Is it that an attachment or execution shall not be levied at all upon such property, or if levied upon, that it shall not be detained in possession of the officer, as provided by law, in ordinary cases?

Section 103, page 571, Compiled Statutes, contemplates that a levy may be made upon property exempt by law from execution. And in *Tullis v. Orthwein*, 5 Minn. 377, we held that the officer holding an execution has the right to levy upon property exempt from execution, and consequently to take the same into possession. This rule, although correct in that case, is perhaps too broadly stated, and is not applicable to every case of a levy of attachment or execution. The object aimed at by section 103 does not necessarily require such construction, and the application of the rule might in some cases lead to injustice. Where exempt property is mingled with

other of the same kind not exempt, or where the debtor's property is so situated that the party cannot know that it is exempt, there may be justification for a levy, and liability therefor only arise upon proper demand for the exempt property.

But where, as in the case at bar, a separate and distinct article of property is taken, which is expressly exempt by statute, and the party holding or directing the service of the writ knows before or at the time of such service that the property seized is exempt, there is no reason for claiming that the liability of the party attaching does not occur at the time of the levy, nor that a demand and refusal is necessary in order to make the party levying liable as a wrong-doer. In such circumstances, the wrong is committed at the instant of seizing the property, and the cause of action then accrues. A demand could not be necessary to inform the creditor of the rights of the debtor, for the statute fixes those, and a demand could be only an idle ceremony. The statute makes the exemption absolute, and not dependent upon selection or demand by the debtor.

There are cases in which a selection and demand may be necessary, in order to fix the liability of the attaching party, and the case of *Tullis v. Orthwein*, 5 Minn. 377, was strictly of that character. But there are cases in which such proceeding is unnecessary, and the one here presented is of that kind. The statute of 1851 only exempted the specified articles from sale under execution or attachment and exempted a team in order to enable a person to carry on the profession, trade, occupation, or business in which he was wholly or principally engaged. The law of 1858 has dispensed with these restrictions. It exempts the property absolutely, whether the debtor needs the team for carrying on his business or not, and he is only required to make a selection or demand in the cases where the reasons as above referred to exist. Where such demand is necessary, it need not here be decided whether it is absolutely essential that the debtor should in terms specify that he demands the property on the ground that he claims it as exempt, though that, undoubtedly, would be the safer course.

The plaintiff was sworn as a witness in his own behalf, and the four following questions were put to the witness, and respectively objected to by defendant on the ground that they were irrelevant:—

What, if any, team did you own on the sixteenth day of November, 1859?

What, if any, other team or stock did you own at that time?

Did the defendant Jones frequently visit your place of residence before the sixteenth day of November, 1859?

Was there any conversation between you and defendant Jones on or before the sixteenth day of November, 1859, in relation to the horses you have mentioned?—if so, state the time and place thereof.

The answer of the defendants denied that this property was exempt from attachment or execution, which issue necessarily involved that of the defendant's knowledge on the subject.

The object of the questions is not stated, but from their tenor it is manifest that the evidence sought was to prove these issues, and especially the charge that the defendant Jones knew the property was exempt. If the plaintiff could show that he had no other team at the time of the levy, and that the defendant had the means of or actual knowledge of the fact, the circumstances would be material and relevant to the issue. We think the questions were relevant; and at all events, this court would not be justified in setting aside a verdict on the ground that irrelevant questions or testimony was admitted, unless it appeared, or might reasonably be inferred, that prejudice had been sustained by the complaining party.

Objections were taken by the appellants to any evidence showing, or tending to show, the value of the property. The case does not state the ground of the objection below, but the reason here given is on account of the insufficiency of the pleadings. This ground we think true in fact, but it cannot avail the defendant, inasmuch as the insufficiency complained of, or that exists, occurs in the answer. The answer denies that the property is "of the value or worth the sum of \$267, as alleged in the complaint." Where the question of value is material, this form of denial is insufficient, and admits the value as stated. It is in pleading termed a negative pregnant. Where a party would controvert an allegation of value, he must allege that the article is of no value, or the value as he claims it to be. Under such an allegation as this, the value might be one cent less than alleged in the complaint, and yet the answer would be literally true. The defendant cannot therefore complain that the plaintiff introduced evidence to prove the value of the property, unless it were on the ground that it was to prove a higher value than was alleged in the

complaint. And if the denial of value is good, then the plaintiff should introduce proof to support the issue.

The defendant offered in evidence the statement of facts expected to be proved by Perry H. Jewett, as stated in the affidavit of defendants for continuance. A portion of the same was as follows, viz.: "That said plaintiff has not been actually damaged in any sum of money by reason of the alleged taking or detention of the property mentioned in the complaint, because the plaintiff had no actual service for which said property was needed or could have been used by said plaintiff." This evidence was objected to by plaintiff, and excluded by the court, to which ruling defendants excepted.

It is claimed that this evidence was proper in mitigation of damages. No special damage is alleged or claimed for loss of service of the horses, and defendant's counsel in his argument states that if exemplary damages are allowed at all, it is on account of the injury to the feelings of respondent. Such is one reason given by most elementary writers, and assuming it to be correct, we fail to see any error in excluding the evidence. An injury to the pocket of the plaintiff might occur from the seizure of the property, if he was making any profitable use of it, and were damages predicated on that ground, the evidence might be proper. But the injury to the feelings arises from the outrage upon the plaintiff's rights by the illegal seizure of his property, and it is scarcely possible to conceive that such injury would be less because the plaintiff, at the time of the seizure, had not the team in active service.

The following question was asked of Oliver Jones, one of the defendants, a witness for the defense, by defendant's counsel, viz.: "Was any portion or the whole of the property mentioned in complaint demanded of you, as exempt property, by the plaintiff or any one in his behalf, before the commencement of this action,—if so, when and where?" The question was objected to as incompetent and irrelevant by plaintiff, and excluded by the court, and this ruling is here alleged as ground of error.

The complaint states that the plaintiff demanded the property of the defendant, and the allegation is not denied by the answer. So far as a demand of the property is concerned, therefore, it is admitted by the pleadings. But it is claimed by appellants that the question was not intended to negative the pleading,—that it is confined to a demand "as exempt property," and was proper as reaching the degree of malice on

the part of appellants, and to go to the jury as affecting the amount of exemplary damages. In the views hereinbefore expressed, with reference to the sufficiency of the complaint, it is considered that a good cause of action is stated without a demand. The wrong was complete when the defendants took plaintiff's exempt property, knowing it to be such. And if any malice there was, it was as fully expressed by that act as it would have been by a refusal to deliver the property, after it had been demanded as exempt. The want of a demand, either general, as stated in the complaint, or special, as suggested by the question, could not diminish the guilt or liability of the defendants. When the original taking is wrongful, the demand is unnecessary.

But whether this view be correct or not, is entirely immaterial, so far as the defendants are concerned, for in the very next line after the statement that the objection of the plaintiff was sustained, we read the witness further testified as follows: "I have no knowledge, and was not notified before the commencement of this action by any person for the plaintiff, or by the plaintiff, that he claimed the property mentioned in complaint as exempt property." There was no motion to strike out this testimony, so far as the case shows, and the defendant has received the full benefit of his question, and has no ground to complain of the ruling upon the same.

The same witness was asked by defendant's counsel this question: "Why did you not take the property the plaintiff proposed to turn out to you in payment of your demand against him, and what reason did you assign at the time for not taking the same?" This question was objected to on the ground of irrelevancy, and excluded by the court.

The witness, in his direct examination, had testified to a conversation with the plaintiff, in October, 1859, in which the latter had claimed to own some other stock besides these horses, and in his cross-examination said he either proposed to take some of the property, or the plaintiff offered to turn out some. It is difficult to see how the answer to the above question, whatever it might be, could affect the issues in the case. It is claimed that it was proper, as rebutting the cross-examination of the same witness. How the answer to the question could rebut any statement the witness had made, is not apparent, and even were it so, it does not appear how the defendant is prejudiced by not being permitted to rebut himself. Nor was it proper for the jury to take the testimony of defend-

ant, as stated on cross-examination, into consideration as an aggravating circumstance, as the circumstance testified to occurred the month previous to the seizure, and was unconnected with it; and if the counsel for the plaintiff made an improper use of the testimony in addressing the jury, the defendant should have interposed his objection at such time.

E. C. Stacy was called as a witness in rebuttal by plaintiff, and this question proposed, viz.: "Had the plaintiff in October, 1859, a yoke of oxen and another horse which he claimed to own?" To which the defendants objected that the same was irrelevant and not in rebuttal, and that witness had been examined in chief to same point. The objection was overruled.

If the objection of irrelevancy relate to the issues raised by the pleadings, we think it is well taken, but the question was not irrelevant to the evidence offered by defendants. The defendant Jones had sworn that in October, 1859, plaintiff claimed to own another horse, and a pair of steers. It is urged that the witness could not give evidence that the respondent did not claim to own the property. But the question is susceptible of a division, and the witness might have known whether the plaintiff had such property in possession, even if he could not state whether he claimed to own it. But no such objection was raised below. And even in regard to the claim of ownership, the testimony of the witness might not be entirely without weight, depending upon the degree of intimacy existing between witness and plaintiff. The question following, with reference to the ownership of the gray horse, was objected to on the same ground, and substantially the same reasons justify its admission, and it is deemed unnecessary to further consider it. The time at which the question was admitted was within the discretion of the court.

Some or one of the witnesses on the part of the defendants, in testifying to the value of the horses, had given as a reason for the value fixed that the horses were unsound. The plaintiff, in his rebutting evidence, asked the witness Stacy, "Were the horses attached by defendants unsound?" This question was objected to by defendants, on the ground that the witness had been examined in chief by plaintiff, cross-examined and dismissed by defendants, and is a re-examination of the witness in chief, and is not in rebuttal. The objection was overruled.

If the objection be true in fact, that this question was a re-

examination of the witness in chief, after he had once been dismissed, it is not ground of error. It is within the discretion of the court to permit such re-examination, and a court of review will not interfere with the exercise of this discretion, unless it may be for abuse of the same: 1 Greenl. Ev., c. 3, sec. 431; Graham & Waterman on New Trials, 675, 676 et seq.

But we think the question was proper as rebutting evidence. Nothing had been said by the witnesses for the plaintiff on their examination in chief as to the soundness or unsoundness of the horses. That was new matter introduced by defendant. It was assigned as a reason by the witness for the low value he fixed upon the horses. We think the plaintiff had the right to show that the witness was mistaken in his reason. To cut him off from this right would be giving too narrow a construction to the rule regarding the introduction of rebutting evidence. The witness Jones, who testified to this unsoundness, did so, it is true, upon cross-examination by plaintiff, but we think such cross-examination was pertinent to the direct, and that the plaintiff did not, so far as the evidence shows, make the witness his own, as upon independent matter, and was entitled to contradict him. This view disposes of several other objections, upon the same ground, to evidence introduced by plaintiff to the same point.

The court charged the jury "that defendants admit in their answer that the plaintiff demanded the property before the commencement of this action, and that therefore it was unnecessary to prove a demand in order to enable plaintiff to recover, and also that if said property was exempt from execution and sale upon the process, it was also exempt from attachment." To this charge the defendants excepted.

In considering the objection to the complaint which was first raised upon the trial, we had occasion to determine that in this case a good cause of action was alleged without reference to the allegation of a demand. The court below seems to have tried the action upon the theory that a demand was necessary, but that it was admitted by the pleadings. It is true indeed, that a demand is admitted by the answer; but not the demand which the defendant contends is necessary. But if no demand is necessary, then it does not appear that the defendants have been prejudiced by the charge. It is claimed that the jury would consider the demand as in aggravation of damages. The language used in the charge

shows that the court spoke of it in its relation to the cause of action, as something necessary to "enable the plaintiff to recover." There is no evidence that the jury considered the demand as in aggravation of damages, and we are not to presume that such was the case. We do not see that the defendants are in any worse position under the charge than they would have been had the court charged that no demand was necessary. Nor was there any error in the charge in relation to the liability of the property to attachment.

The defendants asked the court to instruct the jury as follows:—

1. The jury must be satisfied from the evidence that the property mentioned and claimed in the complaint as exempt property by the plaintiff was chosen by the plaintiff as exempt property at the time the property was attached, as stated in complaint, and admitted in the answer, and that the plaintiff notified the defendant, or the deputy sheriff, who attached the property, at that time that he so claimed his right of exemption,—otherwise the jury must find a verdict for the defendants.

This instruction was refused by the court, and defendant excepted.

There was no error in the refusal to charge as requested. In the views hereinbefore expressed, it will be seen that we hold that in this case a demand, whether general, as alleged in the complaint, or special, in the language claimed by defendant, was unnecessary. But even were a demand required, the instruction would still be incorrect, in the form in which it is put by defendant. It cannot be true, as a general proposition, that where a demand is necessary to constitute a cause of action that it should be made, in all cases, at the time of the levy. Such a rule would sometimes work injustice, as cases might arise where it would be impossible for the debtor to make the demand at such time. The demand should be made within a reasonable time; and what that is, must depend upon the circumstances of each case.

The defendants further requested the court to charge that "if the jury believe from the evidence that the taking complained of was not a wrongful taking, then the defendants are entitled to a verdict." This instruction was given with this explanation, that the taking was wrongful if the property was exempt from attachment, and the plaintiff had not tacitly or otherwise waived his right to said exemption. To this explanation the defendants excepted.

We think the law was correctly given as stated in the explanation to the charge requested by defendants. If the property was absolutely exempt from levy upon attachment or execution, the taking was without authority of law, and necessarily wrongful.

The defendants also asked the court to instruct the jury "that the rule of damages in this action is the value of the property in cash at the time of the taking, and legal interest on such sum from that time." This instruction was given with this further instruction, "that if the jury should find that the defendants, knowing the property to be exempt, willfully and maliciously attached the same for the purpose of harassing and oppressing the plaintiff, then they would not be limited to the value of the property and interest thereon, but they might award such damages to the plaintiff as they should deem him entitled to under the circumstances." To this charge the defendants excepted.

In regard to the rule of damages in cases like the present, the decisions have not been entirely uniform in this country, but the great weight of authority has been in favor of giving vindictive or exemplary damages. The rule as stated by Mr. Sedgwick is thus laid down: "Where either of these elements (fraud, malice, gross negligence, or oppression), mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender": Sedgwick on Damages, p. 39.

And Mr. Starkie states that "as the jury in an action of trespass are not restrained in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended, the plaintiff is at liberty to give in evidence the circumstances which accompany and give a character to the trespass": 2 Stark. Ev., pt. 2, p. 1114.

Mr. Greenleaf does not seem to approve this rule, although some of the authorities cited in the notes to his work on evidence are those which sustain it. But we think the rule allowing punitive or exemplary damages in cases of willful and malicious trespass, is based upon sound reason, and

recognized by too numerous and weighty authorities to be now disturbed, and will be regarded as the correct one by this court: *Pacific Ins. Co. v. Conard*, 1 Bald. 138; *Tift v. Culver*, 3 Hill, 180; 3 *Graham & Waterman on New Trials*, p. 1126; *Sampson v. Henry*, 11 Pick. 379; *Wills v. Noyes*, 12 Id. 324; *Reed v. Davis*, 4 Id. 215; *Cable v. Dakin*, 20 Wend. 172; *Hoyt v. Gelston*, 13 Johns. 141.

The ground upon which the court instructed the jury in this case, that they might award such damages as they should deem him entitled to under the circumstances, was put in strong language, so that they could not mistake the facts necessary to be proved in order to justify them in giving exemplary damages. They were instructed that they might give such damages, if the defendants, knowing the property to be exempt, willfully and maliciously attached the same for the purpose of harassing and oppressing the plaintiff. It is claimed by defendants that there were no aggravating circumstances in this case charged or proved. But we think the fact that defendants knew the property was exempt at the time of the levy is an aggravating circumstance of the strongest character. It would have been a trespass on the part of defendant to have seized plaintiff's exempt property, even without knowledge that it was exempt. But when he seizes it with such knowledge, it is impossible to ascribe any other than a malicious motive to the act, and the jury, we think, would be justified from that fact alone, to find that it was done for the purpose of harassing and oppressing the plaintiff. It was a gross outrage upon the rights of plaintiff, which the law does not tolerate, and justly allows damages by way of punishment and example. "Whatever is done," says Shaw, J., in *Wills v. Noyes*, 12 Pick. 324, "willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or in the language of the charge, to do a wrong or unlawful act, knowing it to be such, constitutes legal malice." We think there was no error in the charge as given.

The defendants also requested the court to charge that "exemplary damages are not allowed in this action." This instruction was refused by the judge, and correctly, for reasons hereinbefore stated.

The court then instructed the jury, if they rendered a general verdict, to find upon the following questions of fact (then submitted by the court to the jury in writing), viz.:—

1. Whether at the time of taking said horses on the warrant of attachment, as alleged in the complaint, the defendant Oliver Jones knew that said horses were exempt from attachment, levy, and sale.

2. Whether said defendant Jones, at the time of said taking, knew that plaintiff claimed said horses as exempt.

To both which directions defendant excepted. The jury found affirmatively on both, and assessed the damages at \$435.59.

The authority for submitting these special issues is given by section 85, page 561, Compiled Statutes. As to the objection here urged, that there is nothing in the pleadings or case showing that the respondent did claim the property as exempt, it does not appear that this was the ground of the objection below. And furthermore, as the case does not show that all the evidence taken upon the trial is presented to this court, we cannot say that the verdict was unsupported by any evidence; especially as a general demand is alleged in the pleadings, and the evidence might have shown that the demand actually was upon the ground that the property was exempt. In such circumstances, we cannot reverse the judgment upon the ground that there was no evidence to support the issue submitted to the jury.

It is also urged that the damages are excessive. Assuming that the jury found the value of the property as alleged in the complaint (and as we hold admitted in the answer), that amount, with interest to the time of trial, would leave less than \$150, found as exemplary damages. We are far from considering these as excessive damages, under the circumstances, or as having been given under the influence of passion or prejudice, but as reasonable. The verdict cannot be reversed on this ground.

We have given this case, although not involving a large pecuniary amount, the consideration which the able and elaborate argument of the counsel for both parties has seemed to demand, and cannot find any ground to interfere with the verdict. The order refusing a new trial must be affirmed.

LEVY UPON EXEMPT PROPERTY, AND LIABILITY THEREFOR: See *Freeman on Executions*, secs. 211-215; and the extensive note to *Van Dresser v. King*, 75 Am. Dec. 645 et seq. The principal case is cited in *Vass v. Stickney*, 8

Minn. 81, where it is said that the case of an officer levying upon property, knowing that it is not that of the defendant, is analogous to that of a seizure of property with knowledge that it is exempt, and that in either case the conduct of the officer is such as may be considered in aggravation of damages. Seizure of property on process, knowing it to be exempt, is said in *Seeman v. Feecey*, 19 Minn. 82, 83 (citing the principal case), to be strong ground for the allowance of exemplary damages.

EXEMPLARY DAMAGES, ALLOWANCE OF, IN GENERAL: See the extensive note to *Austin v. Wilson*, 50 Am. Dec. 767 et seq. The principal case is cited to the point that exemplary damages should be allowed in actions for tort, where the defendant is guilty of fraud, malice, or oppression: *Seeman v. Feecey*, 19 Minn. 82, 83; *McCarthy v. Niskorn*, 22 Id. 91; *Boetcher v. Staples*, 27 Id. 308.

ADMISSION OF IRRELEVANT EVIDENCE as ground for a new trial: See, for a full discussion of this topic, the note to *Winkley v. Foye*, 66 Am. Dec. 717-730. Exceptions to the rejection of evidence, which is afterwards admitted, are not ground for setting aside the verdict, or for a new trial: *Samborn v. Startesant*, 17 Minn. 206, citing the principal case.

MERE NEGATION OF MATERIAL ALLEGATION OF VALUE IS INSUFFICIENT, and amounts to pleading a negative pregnant: See *Goble v. Dillon*, 86 Ind. 331; *Dean v. Leonard*, 9 Minn. 193; *Kingley v. Gilman*, 12 Id. 520; *Fraser v. Williams*, 15 Id. 294; *Hecklin v. Bee*, 16 Id. 52; *Pettigrew v. Dorn*, Id. 209, all citing the principal case.

BUCK v. COLBATH.

[7 MINNESOTA, 310.]

COMPLAINT IN TRESPASS DE BONIS NEED NOT, IN TERMS, ALLEGH "WRONGFUL TAKING," where the facts set up show a wrongful taking. Such an allegation is not one of fact, but a conclusion of law, arising from the facts stated.

INTERVENTION IN TRESPASS—CONFLICT OF LAWS.—Defendant pleaded, in an action of trespass *de bonis*, that he took the property under a writ of attachment out of a federal court, and as United States marshal; and that he took it as the property of another party, defendants in the writ. Such taking being admitted by the pleadings, it is erroneous to charge the jury that the right of property in the goods cannot be tried in the state court, and that there must be a verdict for defendant.

THE facts are stated in the opinion.

Allis and Peckham, for the plaintiff in error.

D. A. Secombe, for the defendant in error.

By Court, **ATWATER, J.** The statement of the case as given in the brief of the plaintiff in error is sufficient for a proper understanding of the points decided, and is as follows, viz.:—

Colbath, the defendant in error, brought trespass *de bonis* against the plaintiff in error, for taking certain goods of the said Colbath, in the town of Anoka.

The plaintiff in error pleaded three separate pleas: 1. A general denial; 2. A plea that he took under a writ of attachment out of the United States court, and as United States marshal; and 3. A plea like the second, but in addition setting up the debt and judgment following, necessary to raise the question of fraud (as claimed by plaintiff in error).

The case was brought on for trial before a jury, and the defendant below moved to dismiss the complaint, on the ground that no wrongful taking was alleged. The motion was denied, and defendant excepted. The defendant then moved for judgment on the pleadings, which motion was denied, and defendant excepted.

The same question raised by this motion was also raised by the charge of the court, and exceptions thereto.

The defendant also asked the court to charge that under the pleadings it was incumbent on the plaintiff below to show a valuable consideration for the sale (to him), which the court refused, and defendant excepted.

The jury found for the plaintiff below, the court denied a motion for a new trial, judgment was perfected, and a writ of error sued out.

There was no error in the refusal to dismiss the complaint. The pleading states a good cause of action against the defendant. The facts stated in the complaint show a "wrongful" taking, although the pleader has not used that word to characterize the act of defendant. The decisions which are cited by plaintiff in error were based upon special statutes controlling the action of replevin; but whatever might have been the rule previous to the adoption of the code, there can now scarcely be a question as to the necessity of such an allegation. It is not an allegation of fact, but a conclusion of law arising from the facts stated.

The second objection urged by the plaintiff in error is, that the court erred in refusing to charge that defendant in error must show a sale for a valuable consideration. We presume this request to charge was based upon the ground or assumption that a sale by a debtor is to be deemed fraudulent as against his creditors, unless a valuable consideration be shown. Whether this proposition be true or not, it is unnecessary here to inquire, as the facts presented by the case are not such as to justify the charge. It does not appear by the pleadings or evidence that the plaintiffs, at whose instance the writ of attachment was issued, under which defendant seeks to justify,

were creditors of the grantors named in the bill of sale, at the time of such sale. With regard to this bill of sale, the case only shows that the plaintiff read in evidence a bill of sale from George C. Colbath & Co. to H. N. Colbath. All that appears here of the contents of that bill of sale is the names of the parties thereto, and the statement of plaintiff in evidence, that "the goods described in the complaint are a portion of those described in the bill of sale. The goods had been in my possession since May, 1861." When this sale was made to plaintiff does not appear. A presumption, it is true, may arise, that it was at the time they came into the possession of plaintiff; but such is not necessarily the case, since they might have been previously owned by plaintiff, and in the actual possession of some other person. We cannot predicate error upon the refusal to charge upon the facts presented by the case.

The counsel for the plaintiff also requested the court to charge "that it being admitted by the pleadings that the defendant took the goods as United States marshal for the district of Minnesota, by virtue of process issuing out of the United States district court for the district of Minnesota, the right of property in the goods cannot be tried in this court, and there must be a verdict for the defendant." The court refused so to charge, and defendant excepted.

In the case of *Lewis v. Buck*, 7 Minn. 104 [*ante*, p. 73], which was an action of replevin, decided at the present term, we had occasion to examine a plea substantially the same as is here interposed, and held that it constituted a good defense in that case. That case was decided upon the authority of *Freeman v. Howe*, 24 How. 450, and upon the ground that the United States supreme court had in the case last cited, directly decided the point presented in *Lewis v. Buck*, *supra*. The gist of the action in *Freeman v. Howe*, *supra*, was the question of right to the immediate possession of the property, and the court held that the marshal having first seized it under his writ, he should retain it until the right of property was determined in that court, and that a plea setting forth the facts should, if admitted, constitute a conclusive defense. And this, not because the state court had not jurisdiction of the action or person, but rather from the necessity of the case, arising from the peculiar relations of the state and federal courts to avoid an unseemly conflict of authority with regard to the property itself, and not arising out of any conflict

in determining the title of the property. We do not understand that the case of *Freeman v. Howe*, *supra*, decides or establishes the abstract principle, that in all cases where an officer has seized property under the process of any particular court, the question of title to the property must be determined in that court; but rather, that the principle is limited to the action of replevin, or where the question is as to the immediate possession of the property. And as we assented to the doctrine in that case, only on the ground of *stare decisis*, and not because satisfied with the correctness of the principle held, and reasoning by which it was established, so we do not propose to advance a step further in that direction, until clearly satisfied that the court of last resort has carried the principle to the extent claimed for it by the plaintiff in error. Whatever may be the weight of the reasoning by which the principle in *Freeman v. Howe*, *supra*, is supported, it has manifestly much more force as applied to an action of replevin, than to one of trespass. Indeed, if it can be said that the trial of this action in the state court, involves any conflict of authority or jurisdiction between it and the United States court, it is so in theory only, and can practically lead to no results prejudicial to the rights of either court, or tend to disturb their harmonious relations to each other.

Entertaining these views of the case, it is unnecessary to examine at length the positions of the plaintiff in error as to trespass and replevin being concurrent remedies, and the applicability of the case of *Freeman v. Howe*, *supra*, to the one at bar.

The judgment of the court below must be affirmed.

FACTS ONLY SHOULD BE PLEADED: *Church v. Gilman*, 30 Am. Dec. 82. For an application of this doctrine to code pleading, see *Green v. Palmer*, 76 Id. 492, and note 498.

REPLEVIN WILL LIE IN STATE COURT AGAINST UNITED STATES MARSHAL for goods wrongfully seized under process. So held by a divided court: See note to *Wilson v. Mackenzie*, 42 Am. Dec. 58. But see note to *Gilman v. Williams*, 76 Id. 223, on this point.

JURISDICTION OF STATE COURTS OVER ACTS OF UNITED STATES MARSHALS: *Leavis v. Buck*, *ante*, p. 73, and note thereto 78.

THE PRINCIPAL CASE WAS FOLLOWED in *Colbath v. Buck*, 8 Minn. 85, in which the facts and parties were the same. In *Marsh v. Armstrong*, 20 Id. 85, plaintiffs claimed to own certain personal property which one Hitchcock had mortgaged, and brought an action to recover damages from the defendant for its unlawful taking and detention. Defendant claimed that as United States marshal he had seized the property under and by virtue of a warrant of seizure issued out of a federal court in a proceeding in bankruptcy against

said Hitchcock, and instituted by one of his creditors. It was held that if, under a warrant of seizure against a bankrupt, a United States marshal seizes the property of a stranger, the marshal is a trespasser, and an action for such trespass may be brought in a state court. "It is true," said the court, "that the federal court, in this instance, has obtained the custody of the property, the ownership of which is claimed by the plaintiff; but since no claim of possession of the property is set up in this action, there can be no interference with the property in the custody of the United States court in the proceedings in bankruptcy, and no conflict can ensue between the federal and state courts. The action is properly brought in the state court." The principal case was cited in support of this doctrine; also *Buck v. Colbath*, 3 Wall. 334.

POINTS MADE ON REVIEW OF PRINCIPAL CASE IN UNITED STATES SUPREME COURT: *Buck v. Colbath*, 3 Wall. 334. From the facts in the principal case, *supra*, it will be seen that Colbath sued Buck in one of the state courts of Minnesota, in an action of trespass for taking goods. Buck pleaded in defense that he was marshal of the United States for the district of Minnesota, and that having in his hands a writ of attachment against certain parties, whom he named, he levied the same upon the goods, for the taking of which he was sued by Colbath. But he did not aver that they were the goods of the defendants in the writ of attachment. On the trial, Colbath made proof of his ownership of the goods, and Buck relied solely on the fact that he was marshal, and held the goods under the writ in the attachment suit. The plaintiff had a verdict and judgment, and the judgment was affirmed on error in the supreme court of Minnesota. The supreme court of the United States, on review, decided as follows: 1. That a suit prosecuted to the highest tribunal of a state, and against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper federal court, presents a case for a writ of error under the twenty-fifth section of the judiciary act, when the final decision of the state courts is against the validity of the authority thus set up by the marshal. 2. That the case of *Freeman v. Howe*, 24 How. 450, was an action of replevin, and decided nothing more than that property held by the United States marshal under a writ from a federal court could not be lawfully taken from his possession by any state process; and that the principle of that decision is that the possession of the marshal is the possession of the court for the time being, and that during the litigation, no other court, not having a superior or revisory jurisdiction in the premises, can be permitted to disturb that possession. It is, however, only while the property is in the possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. 3. That an action of trespass, for taking goods, does not come within the principle of *Freeman v. Howe*, *supra*, because such an action does not seek to interfere with the possession of the property attached; but that it does involve the question, not raised in that case, of the extent to which the federal courts will protect their officers in the execution of their processes. 4. That with reference to the question under consideration, all writs and processes of the courts are divided into two classes: *first*, those which describe specifically the property to be seized, and which contain a direct command to the officer to take possession of that particular property; *second*, those which command the officer to make or levy

On the trial, the case seems to have been submitted to the jury on certain written interrogatories, but the paper books furnished us do not inform us whether all the issues were submitted, or only the particular facts embraced in the several written interrogatories. The action itself is one in which the issues of fact should all be tried by the court, unless by consent of parties, or order of the court, they or specific facts involved therein are submitted to the jury or referred.

The jury found specially, upon the interrogatories submitted to them, that the several deeds were made with intent to defraud the plaintiff of his debt against Keck, and that defendant Hoerr had notice of such indebtedness and intention to defraud, and that he received the conveyances to himself in aid of Keck's fraudulent design. But they also found that the indebtedness of Keck to the plaintiff was for moneys advanced by plaintiff to purchase a portion of Keck's pre-emption claim before the same was pre-empted, and that Hoerr had no notice of any other indebtedness from Keck to the plaintiff.

Upon this finding, the defendant moved for judgment, and the court having granted the motion, the plaintiff appealed from the order granting it. He now insists that the finding of the jury, in regard to the nature of the alleged indebtedness of Keck to the plaintiff, was not responsive to any allegation contained in the pleadings, and therefore should not have been considered. We think, however, that as the facts tended directly to disprove the allegation of Keck's indebtedness, they were admissible under that issue as evidence, without being specially pleaded. The defendant traversed the allegation of indebtedness in the words of the allegation, and that was sufficient. He was not required to be more specific than the plaintiff.

The plaintiff further urges that the judge, on the hearing of said motion, was not authorized to go behind the verdict and consider the evidence on which it was founded; and that, as it is apparent from the opinion filed that the court did base his opinion on the evidence as he remembered it, and not upon the verdict alone, the order should be reversed. It was unnecessary, perhaps, for the judge to make any effort to sustain the correctness of the finding by a reference to the evidence on which it was founded, because the verdict itself was conclusive on that point; but still we cannot see how it can affect the merits of the order for him to show that the evidence fully justified the verdict in this particular.

The most important question, however, raised in this case,—one, in fact, involving the right of the plaintiff to relief under any circumstances,—is, whether the judgment which the plaintiff recovered against Keck is conclusive in this action, and precludes the defendant Hoerr from inquiring into the alleged indebtedness on which it was founded.

There seems to be a strange dearth of authorities on the point here presented. Neither party has produced or cited a single case that we have been able to find, that can be said to bear directly upon this question. Reasoning from principle and analogy, however, we have found little difficulty in arriving at conclusions satisfactory to ourselves.

We have before remarked, in substance, that the plaintiff was himself obliged to go behind the judgment, and aver an indebtedness to him at the time of the making of these conveyances, because the judgment was not of itself sufficient, having been rendered long after the lands had been conveyed. It was, therefore, essential to the success of the plaintiff in this action, that he should show himself to have been a creditor of Keck at the time of the transfer. The issue upon this point was, in fact, one of the main issues in the case, for unless Keck was then indebted to him, the plaintiff was not in a position to be prejudiced by any disposition which Keck might make of his property.

But whether Keck was so indebted depends entirely upon the facts as they then existed,—not as they have since been molded by subsequent events. If he had a claim or demand which could then, or when it became due, be legally enforced against Keck, he was a creditor. But if his claim or demand was not of a character to be legally or equitably enforced, he was not a creditor, in our opinion, and therefore could not be prejudiced by any disposition which Keck might choose to make of his property. And if the conveyances were not invalid at the time they were executed, as a fraud upon the rights of the plaintiff (and it does not appear that at that time or since there was any other person to whom Keck was indebted), it seems clear that they could not be vitiated by the subsequent act or omission of the grantor, to which the grantee was not a party.

What then was the character of the plaintiff's claim against Keck?

The jury have found that the alleged indebtedness was for moneys advanced by the plaintiff for the purchase of a portion

of Keck's pre-emption claim, before the same was pre-empted. And this court has held, in the case of *St. Peter Company v. Bunker*, 5 Minn. 192, that such a contract is in violation of law, and against public policy, and that money paid thereon cannot be recovered back. Under this decision, it is plain that the plaintiff had no claim which he could then or at any subsequent time legally have enforced against Keck. He was not indebted to the plaintiff, and the conveyances were not, therefore, at the time they were executed, in fraud of the plaintiff's rights as a creditor. They were valid as between the parties thereto, and equally so as against the plaintiff, whatsoever may have been the intention with which they were made and received.

But says the plaintiff, I have since recovered a judgment on the claim which I then had, and the defendants cannot now deny that the indebtedness on which it was founded was proper and legal. This may be true as to Keck, who was a party to the action, but we cannot admit that the proposition is correct as to the other defendants, who are not parties to said action, and had no opportunity of defending against the plaintiff's claim against Keck. We do not recognize the power of a grantor, under such circumstances, to destroy or impair the title of his grantee by neglecting or refusing to make a proper defense to an action against himself alone, in which the title was in no way involved. That Keck could easily have defeated the action, is apparent from the finding of the jury in the case. And his failure to make the proper defense, whether by collusion with the plaintiff, or through indifference as to the result of the action, would be a fraud upon his grantee, if the judgment were allowed to affect the conveyances.

Again, as the plaintiff has himself found it necessary to go behind the judgment and appeal to the facts as they existed at the time of the transfers, why should he not be bound by them? He alleged that Keck was at that time indebted to him, a fact necessary to his recovery in this action. Why may not the defendant, after traversing this allegation, show that no such indebtedness existed? I cannot understand how the allegation may be traversed, but not disproved. It appears to me that the doctrine contended for by the plaintiff would enable the grantor to defeat his own conveyance at pleasure, and place the grantee entirely at his mercy. A conveyance valid and operative when executed should not be

vitiated by the acts or omissions of a party no longer interested in the subject-matter conveyed. Nor should the holder of a title perfect in its inception be divested of his estate at the will of another over whom he can exercise no control.

Again, our statute is in the terms following:—

“Every conveyance of any estate or interest in lands, made with intent to hinder or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, . . . shall be void,” as against the person so hindered and defrauded.

This, as well as the statutes of most of the United States on the same subject, is taken from the English statutes of 13 Elizabeth and 27 Elizabeth; but as the English statutes do not make use of the term “lawful,” may we not conclude that our legislature inserted it to exclude the idea that such conveyances could be declared void as against any one holding a claim or demand that could not be enforced in a court of justice?

The order appealed from is affirmed.

QUOTATIONS OF PRINCIPAL CASE. — Where A furnishes money to B with which to pre-empt certain United States land, and takes a note therefor, with an agreement that B shall convey to him one half of said lands in consideration of the money received, the transaction is illegal and void: *Ferguson v. Kuntler*, 11 Minn. 109, 110. An entry of the public land by one person in trust for another is forbidden by statute, and equity will not, on a bill to enforce such a trust, decree that any entry in trust was made. All contracts in violation of this important provision of the statute are void and are never enforced: *Warren v. Van Brunt*, 19 Wall. 655.

TURRELL v. MORGAN.

[7 MINNESOTA, 282.]

UNSIGNED INDORSEMENTS OF SUMS OF MONEY PAID ON PROMISSORY NOTE are of themselves no evidence.

INTRODUCTION OF NOTE IN EVIDENCE DOES NOT CARRY WITH IT the indorsements on the back of it of money paid.

INDORSEMENTS ON WRITTEN INSTRUMENTS ARE INDEPENDENT WRITINGS, and can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form.

THE facts are stated in the opinion.

Allis and Peckham, for the plaintiff.

H. R. Bigelow, for the defendant.

By Court, FLANDRAU, J. The only question presented by this case is, whether a party can offer a note in evidence without at the same time putting in evidence all the indorsements that may be upon the back of it. The note offered by the plaintiff was an ordinary promissory note payable to the order of William H. Shelley. On the back of it appeared the name of said Shelley, and above his name appeared the following indorsements:—

“Paid on the within May 19, 1855, twenty-five dollars.”

“October 20, '55, paid six months interest on the within, sixty dollars. (\$60).”

“May 4, 1856, paid on the within, sixty dollars (\$60).”

“October 20, 1857, paid on the within, sixty dollars (\$60).”

“May 20, 1858, paid on the within, sixty dollars (\$60).”

When the plaintiff put the note in evidence he made no reference to any of the indorsements except the name of William H. Shelley, which he read in evidence. After the plaintiff had rested his case, the defendant insisted that the indorsements were all in evidence, and claimed the right to have the payments so proved applied to the principal sum of said note, except so much of each respectively as was necessary to pay what interest was due on said note up to the time of the indorsement, at the rate of seven per cent per annum, etc. The plaintiff insisted that the indorsements were not in evidence, and offered to have the case opened so that the defendant might introduce the same, and any other competent testimony with reference to payments on said note. The defendant, however, did not avail himself of the proposition, and the referee found that they were not in evidence, and disregarded them in his finding, allowing no payments save what were admitted in the pleadings.

The defendant's counsel insists that when an indorsement is made on a note, it becomes part of it, and they are inseparable. It seems to us that this doctrine, if we should admit it to be true in the main, must be qualified by at least one fact, and that is, that the indorsement must appear to be the act of the party to be charged. Now, under our rule of evidence, which differs diametrically from that of any other country that we are aware of, if an indorsement of a payment purported to be signed by a party who had a right to receive it, as for instance the payee or holder of the note, then such indorsement would be *prima facie* evidence of the facts contained in it, until the person by whom it purported

to have been signed denied it under oath: Comp. Stats. 685, sec. 80; and it may be that such an indorsement would be inseparable from the note under the peculiar rule of evidence above referred to; but in this case the indorsements are not signed at all, and nothing appears as to whose handwriting they are in, nor by whom they were placed there, nor whether the payee or holder gave any consent whatever to their being placed upon the note. It is true, a party may always make evidence against himself, and never in his own favor, but when a written admission of a party is sought to be used against him, such as a receipt for the payment of money (and this is the character of these indorsements), it must of course first appear that he made or authorized it.

Now, if these indorsements must, as the defendant insists, be read with the note, they prove nothing against the plaintiff, as *non constat*, but that they were written on the note by the defendant himself, or some equally unauthorized person.

But we do not think the indorsements necessarily form part of the note. In *Roseboom v. Billington*, 17 Johns. 182, a bond was offered in evidence with an indorsement of a payment upon it, made in the handwriting of the payee. Without the aid of this payment, the bond would have been satisfied by the operation of the statute of limitations. There was no other evidence of the fact of the payment having been made besides the indorsement in the handwriting of the payee. It was held, that alone, the indorsement would not prove the fact of payment, and that it would be necessary to accompany it with proof that it was made at the time of its date, or that when made its operation would have been against the interest of the party making it, and with such proof it would be good evidence for the consideration of the jury. Suppose in that case, as in the one at bar, nothing had appeared as to who placed the indorsement on the bond, would it have established a payment for any purpose? We think not. See also *Brown v. Munger*, 16 Vt. 13.

We think that indorsements on the back of written instruments are independent writings, in the nature of receipts or written declarations, and that they can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form.

The counsel for the defendant calls our attention to a case recently decided in Illinois, and which will appear in the

twenty-fifth volume of Illinois reports [*Long v. Kingdon*, 25 Ill. 66], where it was held "that when a note is given in evidence, the indorsements on the back are also in evidence, and that it is error for the jury to disregard them." The only report of the decision that the counsel has seen is in a legal newspaper, and in the above words. There may have been, and probably were, features in the case that made the indorsements evidence, which do not appear in the meagre report we have of it. At any rate, we could not hold against our own convictions upon such doubtful authority. And what strengthens the presumption that the whole of that case does not appear is the fact that the learned and industrious counsel has been unable to find any other that holds the same rule, while there are several that weigh heavily against it, besides those above cited.

The plaintiff seeks a modification of that part of the decree which directs the time of redemption, and right of possession during that time, to be governed by the law in force at the date of the decree, and asks that it be controlled by the law in force at the date of the mortgage. This point was fully considered in the case of *Stone v. Bassett*, 4 Minn. 298, and also in the case of *Heyward v. Judd*, Id. 483. The sale having been made by order of the court sitting as a court of equity, and not under the power of sale contained in the mortgage, the time of redemption and the right of possession during that period must be controlled by the law in force at the time the decree was made.

The judgment must be affirmed.

THE PRINCIPAL CASE WAS CITED in *State of Minnesota v. Monnier*, 8 Minn. 213, to the point that an indorsement forms no part of a note necessarily. The holder of a note may give it in evidence, without offering the indorsements at all. If the maker desires to use the indorsements for the purpose of proving payments, he will be compelled to prove the handwriting of the holder, or if the indorsement is not in his writing, the authority from the holder for the person who made it to place it there. On the other hand, if the holder of a note desires to use an indorsement for his own benefit, as for instance, to take the note out of the operation of the statute of limitations, he will be obliged to prove either the actual payment if the indorsement is in his own hand, or that it was placed there by the maker, or with his authority. But an indorsement on a note, of a payment, not signed, is of no benefit or injury to any one. It is no evidence of anything unassisted by other proof: Id. In this case the indorsement was unsigned. The maker of a promissory note obtained it from the holder, and wrote upon the back of it, "Received the sum of forty-six dollars, Louisville, 21st of January, 1860"; and it was held that such act did not constitute the crime of forgery. The

principal case was cited and commented upon in *Young v. Perkins*, 29 Id. 174, 175, where it was held that to make an indorsement upon a promissory note of a partial payment thereon, evidence under the statute to prevent the bar of the statute of limitations, it must appear by evidence *dehors* the indorsement that it was made at a time when it was against the interest of the holder of the note to make it.

KERN v. VON PHUL.

[7 MINNESOTA, 426.]

INDORSER ON PROMISSORY NOTE CANNOT SHOW BY PAROL that he was an indorser without recourse.

CERTIFICATE OF NOTARY THAT HE DEMANDED PAYMENT, AND GAVE NOTICE of the dishonor of a note to the indorsers thereon, is *prima facie* evidence of the facts stated in it, under the Minnesota statute of 1858.

NOTICE OF PROTEST MAY BE SERVED BY MAIL on a person living in the same town in which the notice is mailed, under the Minnesota statute of 1858.

NOTICE OF PROTEST NEED NOT BE SENT UNDER COVER of what is popularly called an envelope.

NOTARY'S PROTEST IS VALID, though he do not keep a record of it.

THE facts are stated in the opinion.

Daniels and Grant, for the plaintiff in error.

William M. McClure, for the defendants in error.

By Court, FLANDRAU, J. The main question presented by this case is whether an indorser of an ordinary negotiable promissory note can plead and prove that he had a parol understanding at the time he put his name on the note, by which he was not to be liable on his contract, or in other words, that he was an indorser without recourse. At first thought, such a proposition would seem to be in direct hostility to the well-known and most familiar of all rules of law, that parol evidence is not admissible to contradict or vary the terms of a written instrument; but when an examination of the authorities is made, a great many decisions can be found which tend strongly to innovate upon the above rule, all claiming to observe and adhere to it, yet finding some special circumstances in the particular case upon which to base a distinction, and thus evade its rigorous operation. There is a natural desire which is founded on legal principles to impose some character of liability upon a party who signs his name to a contract. This just inclination of the judicial mind, in its efforts to prevent an entire failure of liability, has led to serious encroachments upon the verity and integrity of written instru-

ments, more particularly in regard to promissory notes and bills of exchange than any other species of contracts.

A great deal of this confusion and misapplication of principle has arisen from that class of cases, where a note is drawn payable to the order of one party, and is indorsed by another previous to its delivery to the payee, and the latter seeks to make the former responsible to him. Since the case of *Josselyn v. Ames*, 3 Mass. 274, the question of admitting parol evidence to show the relation of parties to each other, and to fix their relative liabilities upon such paper, has received the adjudication of almost all the courts of this country, and the weight of authority is decidedly in favor of the competency of such evidence. Whether this is a departure from principle to meet the exigencies of a special case, it is needless now for this court to determine. When we succeeded the supreme court of the territory of Minnesota, we found three decisions of that court upon the records adopting the general current of decision: *Pierce v. Irvine*, 1 Minn. 369; *Rey v. Simpson*, Id. 380; *Winslow v. Boyden*, Id. 383. We followed the precedent in several cases, and think it should now be regarded as the settled law of the state: *McComb v. Thompson*, 2 Id. 139 [72 Am. Dec. 84]; *Marienthal v. Taylor*, Id. 147.

The attempts that have been made to apply the rule recognized by these cases to others bearing analogy have gradually and insidiously undermined the rules of evidence and introduced uncertainty and insecurity into a system which should rest upon principle alone. It is not our purpose to extend a rule which we deem questionable. In the course of our investigations we have been frequently called upon to examine questions kindred to the one at bar; and have in every instance, where we were untrammelled by the precedents of our own courts, adhered with strictness to the immutability of written instruments when assailed by parol evidence: *Levering v. Washington*, 3 Minn. 323; *Walters v. Armstrong*, 5 Id. 448; *Borup v. Mininger*, Id. 523; *Peckham v. Gilman*, 7 Id. 446.

In the case at bar, the defendant Kern wrote his name on the back of the note without restriction or qualification. That alone imports a contract just as well known in the law as if it was all written out over the signature: Story on Promissory Notes, sec. 135. He now seeks to prove by parol that the essence of the contract, which *prima facie* his name creates, was extracted by a parol reservation at the time the indorsement was made; or in other words that his contract was to

impose no liability or obligation upon him. We do not think it can be done. The contract of indorsement does not fall within the class of contracts, that being partly reduced to writing, and partly resting in parol, may be established as an entire obligation or agreement. These contracts are generally characterized by some incompleteness in the written part, indicative of other stipulations being necessary to its perfection, or some kindred feature that takes them out of the ordinary rule. An indorsement lacks no element of perfection. It creates a contract, the obligations and liabilities of which are as well settled as any known to commerce. It therefore is not subject to be varied or defeated by a cotemporaneous verbal agreement.

The counsel for the defendants seems to have fallen into an error of fact about the allegation of notice of dishonor having been served on the indorsers being in the complaint. We find a full allegation to that effect in folio 20 of the paper books. The note was protested on the third day of April, 1858. At that time, the service might be made by mail even upon a party resident within the town where the notice was mailed: Old R. S., c. 4, art. 6, sec. 5, as amended by sec. 4 of the Laws of 1856, pp. 5, 6; *Levering v. Washington*, 3 Minn. 323. The notaries were, by section 6 of the same act, required to keep a record of the notices so served, and such record was made evidence. On the 26th of July, 1858, the law above referred to was repealed (Comp. Stats. 185, sec. 101), and a new law enacted, which allows the "instrument of protest accompanying any bill of exchange or promissory note which has been protested," etc., to be evidence of the facts stated in it: Comp. Stats., p. 134, sec. 96. This section refers as well to past as future protests. The trial of this action came on in April, 1862. The notarial certificate was, therefore, evidence under the law of 1858, which was in force.

If a notice was properly folded and addressed, it would be sufficient, whether under cover of what is popularly called an "envelope" or not; nor is it essential to the validity of a protest that the notary should keep a record of the same. It might have been difficult or impossible to prove it under the law of 1858, if no record was made, but the law of 1858 furnished another mode.

We see no error in the record, and the judgment of the court below must be affirmed.

PAROL EVIDENCE TO EXPLAIN OR VARY EFFECT OF INDORSEMENT: *Patterson v. Todd*, 57 Am. Dec. 622; *Perkins v. Catlin*, 29 Id. 282; *Sanborn v. Southard*, 43 Id. 288; *McComb v. Thompson*, 72 Id. 84; *Clapp v. Rice*, 74 Id. 639, and collected cases in notes thereto.

CERTIFICATE OF NOTARY IS PRIMA FACIE EVIDENCE of the facts therein set forth: *Fogarty v. Finlay*, 70 Am. Dec. 714, and note 717; *Citizens' Bank of Baltimore v. Howell*, 63 Id. 714; *Smith v. McManus*, 27 Id. 519, and note 522; *Browne v. Philadelphia Bank*, 9 Id. 463. For other cases concerning notarial certificate of protest as evidence of notice, see *Stewart v. Allison*, Id. 433; *Lewiston Falls Bank v. Leonard*, 69 Id. 49; *Crocker v. Crane*, 34 Id. 228, and notes to these cases. Notary's certificate is *prima facie* sufficient evidence that notice of non-payment of a check was properly directed: *Crocker v. Crane*, *supra*. Recital of "notice given" in protest is evidence of that fact: *Towle v. Randall*, 65 Id. 547.

NOTICE OF DISHONOR OF NOTES, BILLS, ETC., HOW SERVED WHERE PARTIES RESIDE IN SAME CITY OR TOWN: See note to *Ransom v. Mack*, 38 Am. Dec. 608-613, discussing this subject at length.

THE PRINCIPAL CASE WAS CITED IN *Barnard v. Gaslin*, 23 Minn. 196, and *First Nat. Bank etc. v. National Marine Bank etc.*, 20 Id. 69, to the point that parol evidence is inadmissible to vary contract of indorsement; and in *Montelius v. Charles*, 76 Ill. 310, it was cited to the point that the statute making a notary's record of the protest of bills which he is required to keep, or a certified copy thereof, *prima facie* evidence of the facts therein stated, applies to all bills, whether domestic or foreign; and that such record or copy is *prima facie* evidence of demand of payment of the drawee, and of notice of dishonor to the drawer, liable, however, to be rebutted by other competent evidence.

TUTTLE v. STROUT.

[7 MINNESOTA, 456.]

LAW EXEMPTING PROPERTY FROM EXECUTION IS UNCONSTITUTIONAL AND VOID under the Minnesota bill of rights, if it excepts from the exemption provided debts or liabilities for wages due to clerks, laborers, or mechanics.

CONSTITUTIONAL PROVISION THAT ACT SHALL NOT EMBRACE MORE THAN ONE SUBJECT is not violated by including under the title "An act for a homestead exemption," provisions for the exemption of personal property.

The facts are sufficiently stated in the opinion.

O. C. Merriman, for the appellant.

J. S. and D. M. Demmon, for the respondent.

By Court, EMMETT, C. J. The questions presented for our consideration in this action involved the constitutionality of the act entitled "An act for a homestead exemption," passed March 12, 1858. Each party urges a constitutional objection. The plaintiff claims that that portion of the act which excepts

from the exemption provided debts or liabilities for wages due to clerks, laborers, or mechanics, is in direct conflict with section 12 of the bill of rights, which directs that "a reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability."

On the other hand, the defendant insists that the whole act, or at least that portion relating to personal property, is void, because in violation of section 27 of article 4 of the constitution, it embraces more than one subject-matter.

In regard to the question raised by the plaintiff, we cannot resist the conclusion that the ninth section of the act conflicts with section 12 of the bill of rights. The language of the constitution is too plain to admit of a serious doubt, either as to its interpretation or application to the act under consideration. "A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability." This includes debts or liabilities of every kind or description, without exception; and it certainly requires no argument to show that a sum of money due for services rendered by a clerk, laborer, or mechanic, is a debt or liability. The constitution makes no exception in favor of any particular class of persons, or kind of debts or liabilities, nor should we recognize the right of the legislature to make any such distinctions. If one class of persons, or kind of debts or liabilities, may be excepted, all may be; and the constitutional provision might thus be rendered entirely nugatory.

As to the defendant's objection that the act is void as embracing more than one subject, we may remark that since the decision of this court in *Board of Supervisors of Ramsey Co. v. Heenan*, 2 Minn. 330, the question can hardly be considered as still open. We there held, in substance, upon a similar objection raised to the "act to provide for township organization," passed August 13, 1858, that although this provision of the constitution was not merely directory, yet where the several provisions of an act of the legislature related to one general subject, and there was no evidence of an attempt fraudulently to insert matter foreign to the subject expressed in the title, there was no violation of the spirit of the constitutional provision, though it may not have been followed to the letter in adopting the title; and therefore that, under the title of "An act to provide for township organization," the legislature might also provide for county organization and government. We think the law under present consideration

is as little liable to the objection as that passed upon in the case above referred to. There is no pretense of fraud in its passage. There is but subject, that of exemption from sale on execution, legislated upon by the act. And although the title, it being "An act for a homestead exemption," while the act treats also of exemptions of personal property, does not necessarily cover the entire subject, it is sufficiently suggestive thereof to satisfy the requirement of the constitution. Indeed, the whole act may, in one sense, be considered as a mere amendment to the law then in force, in which the legislature, in the division and treatment of the subject-matter, have but followed in the path laid down by the old law.

The judgment of the district court must be affirmed.

EXEMPTION FROM EXECUTION CANNOT BE EXERCISED SO AS TO CREATE PREFERENCES.—The exemption law prohibits preferences among lien creditors: *Garrett and Martin's Appeal*, 72 Am. Dec. 779.

ACT OF LEGISLATURE TO EMBRACE BUT ONE SUBJECT, WHICH SHALL BE EXPRESSED IN ITS TITLE: See extended note to *Davis v. State*, 61 Am. Dec. 337-346; note to *Belleville R. R. Co. v. Gregory*, 58 Id. 600; *Santo v. State*, 63 Id. 487; note to *People v. McCann*, 69 Id. 648; note to *Firemen's Benev. Ass'n v. Lounsbury*, 74 Id. 119; *Parkinson v. State*, Id. 522, and note 534, where numerous questions connected with this topic will be found considered. An act is not in violation of the constitutional provision that every law shall embrace but one object, which shall be expressed in the title, although it embrace several ideas or steps in the progress of its provisions toward the attainment of the main object expressed in the title. This object may be a broader or a narrower one; but if the several steps embraced in it are fairly conducive to that end or object, it is still a unit: *Santo v. State*, 63 Id. 487.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: The constitutional restriction that "no law shall embrace more than one subject, which shall be expressed in its title" must be liberally construed: *State of Minnesota v. Gut*, 13 Minn. 349; *State v. Young*, 47 Ind. 170, 171. In the case last cited the court quoted from *State v. Kinsella*, 14 Minn. 524, as follows: "The exigencies of legislation require that this provision should not be so strictly construed as to cripple the legislature by prohibiting the insertion into laws of those matters which, though they may not be specifically expressed in the title, are proper to the full accomplishment of the object so expressed; such is presumed to have been the intention of its authors; courts, therefore, give it a liberal construction. The insertion, in a law, of matters which may not be verbally indicated by the title, if suggested by it, or connected with, or proper to the more full accomplishment of the object so indicated, is held to be in accordance with its spirit; but a more liberal construction cannot be given without letting in the evils which the provision was intended to exclude." The principal case was cited as being to the same effect. In *State v. Gut*, 13 Id. 349, 350, the title of the law objected to was in these words: "An act to change the titles of and regulate the holding of courts for counties unorganized for judicial purposes, and to regulate the manner in which the counties, to which they are

attached for such purposes, are to provide for the transaction of the business of counties which have no board of county commissioners." This was objected to as violating the constitutional restriction above named, on the ground that "in the body of the act the first seven sections are devoted to regulating the holding of the courts, etc. In the eighth section the whole subject of county business is provided for, with a limitation upon the powers of county commissioners," etc. The court overruled the objection and quoted from the principal case at some length. "Under section 8," the court said, "jurors are drawn and returned from counties having no commissioners. That part of the law providing for such drawing and return is germane to the other portions thereof, which provide for the holding of the courts on which jurors are to attend, and although greater power is perhaps conferred on the county officers than is necessary to enable them to draw or return jurors, we do not think the law is therefore void."

So where the title of a chapter was "An act to amend the charter of the city of St. Paul," it was objected that section 7 of the chapter violated the constitutional restriction that "no law shall embrace more than one subject, which shall be expressed in its title." This section provided, in substance, that the collector of taxes for Ramsey County should pay over his collections on account of the city to the city treasurer on the first Monday of each month. This was claimed to relate to a different subject from the balance of the chapter, which was devoted to amendments to certain specified sections of the city charter. But the court said: "We think section 7 may with propriety be regarded as an amendment to such charter, and that the law does not embrace more than one subject on account of the insertion of section 7, any more than it does on account of the insertion of the preceding sections, which relate to different matters of detail, but to the same general subject, to wit, the government and management of the affairs of the city of St. Paul. The collector of Ramsey County is collector of city taxes, and *pro hac vice*, a city officer:" *City of St. Paul v. Colter*, 12 Minn. 50, 51, citing the principal case. Where the title of an act in question was, "An act to authorize the Winona and St. Peter Railway Company to consolidate with the Minnesota Central Railroad Company, and to bridge the Mississippi River," it was objected that it embraced more than one subject, viz., consolidation, bridging the Mississippi, and taxation. The majority of the court were of the opinion that the objection ought to be sustained, but the opinion of the justice who delivered the opinion was that the law of the case came within the principle laid down in the principal case: *Winona and St. Peter R. R. Co. v. Waldron*, 11 Minn. 535. Under an act entitled "Homestead Exemption," the second section of the act provided that a mortgage or other alienation of a homestead by the owner thereof, if a married man, should not be valid without the signature of the wife to the same. This section was held to be constitutional, and embraced within the subject expressed in the title of the act: *Barton v. Drake*, 21 Id. 303. It is constitutionally competent for the legislature to determine the amount of property that shall be exempted from seizure or sale for the payment of any debt or liability, and to increase or diminish such amount from time to time; but it cannot, in its exemption laws, discriminate between different classes of creditors, and kinds of debts or liabilities: *Coleman v. Ballandi*, 22 Id. 147.

TILLOTSON v. MILLARD.

[7 MINNESOTA, 512.]

ACTUAL RESIDENCE UPON PREMISES CLAIMED AS HOMESTEAD IS NECESSARY under the Minnesota homestead act of 1858, to exempt them from sale on execution.

JUDGMENT LIEN ATTACHES TO HOMESTEAD owned and occupied by the debtor as a residence, and may be enforced whenever the premises cease to be occupied by the debtor or his family as a homestead.

LEGISLATURE CANNOT DEPRIVE JUDGMENT CREDITOR OF HIS LIEN ON HOMESTEAD PREMISES, after the right is perfected by the docketing of the judgment; nor of his right to sell the property on execution, upon its ceasing to be a homestead.

ACT ENLARGING RIGHTS OF HOMESTEAD OWNERS IS PROSPECTIVE ONLY, and cannot affect judgments obtained prior to its passage.

ACTION to set aside sale of land. D. J. Millard obtained a judgment against A. J. Tillotson, who at the time resided on the premises in question and claimed them as a homestead. After the judgment was docketed, Tillotson and family removed to another part of the county, but notified Millard that he still claimed the premises as his homestead. The premises were levied upon and sold under the judgment, and H. C. Butler became the purchaser. Butler was made a party defendant by Tillotson, who brought suit to have the sale set aside. The court refused to set aside the sale, and gave judgment for defendants, and plaintiff appealed.

R. A. Jones, for the appellant.

Henry C. Butler, for the respondents.

By Court, **ATWATER, J.** The word "homestead" in ordinary use has a popular and well-understood meaning, which may be sufficiently accurately defined as the place of residence of the family. That is the prominent idea connected with the use of the word, a dwelling-house being inseparably associated with the meaning of the word, in which the family of the owner resides, and connected therewith a greater or less quantity of land. There can be no doubt but the legislature in the exemption act have used the word in its ordinary acceptation, and have not intended it should receive any restricted or technical signification, if indeed any such it has. The language of the act of 1858 (which was in force at the time the judgment herein specified was obtained), seems to assume, as a matter of course, that a dwelling-house is a constituent and indispensable part of the homestead. While the popular idea

attached to the word "homestead" includes a dwelling-house as an indispensable part, as above stated, it includes a certain, but no definite quantity of land, and one purpose of section 92, page 569, Compiled Statutes, was to fix a definite limit to the quantity of land which, with the dwelling-house, should constitute the homestead.

The homestead, then, which the statute exempts from sale on execution, is (in this case) eighty acres of land, with the dwelling-house thereon, and its appurtenances, owned and occupied by any resident of this state. It is claimed by the appellant that actual residence upon the premises is not necessary to entitle a debtor to his privilege of exemption; and that the word "occupied," as used in the statute, means "use, tenure, possession." That such is the frequent meaning of the word may be conceded, but we cannot think that such is its meaning as used in this statute. The premises are to be occupied as and for the purpose of a homestead, as is manifest from the connection in which the term is used. The object of the statute was to protect the debtor and his family in the enjoyment of a home, and not to give him the use of a certain quantity of land and dwelling-house for any other purpose. To call the premises the homestead of the debtor and his family, when the debtor resides elsewhere, and rents or leaves the premises vacant, would be a misnomer,—a use of language never contemplated by the legislature. Substantially the same views are expressed in *Folsom v. Carli*, 5 Minn. 333 [80 Am. Dec. 429], and after further argument and consideration, we see no reason to change the views there expressed, as to the necessity of the occupancy of the homestead as a residence, by the debtor and his family, in order to entitle him to the exemption provided by statute.

The act of 1851 (R. S., p. 363, sec. 93) exempted from sale on execution a homestead, "that is to say, the land and buildings thereon, occupied as a residence, and owned by the debtor, he or she being a house-holder, to the value of one thousand dollars." The repealing act of 1858 has changed this language, using instead the phrase "occupied by any resident of this state." This language, it may be admitted, is less explicit in fixing the residence of the debtor upon the exempt premises, and the objection that by the omission of these words the legislature intended to change the rule as to the residence would have much force, were this the only marked change in the act of 1858, as stated by the counsel for the appellant.

But the important change contemplated by the last-named act was to substitute a definite quantity of land from exemption, irrespective of value, instead of an amount limited to the value of one thousand dollars. The language employed will not justify the construction that the legislature intended to go further than this, and dispense with a residence upon the premises. It is not necessary to adopt the opposite construction, in order to give effect to the clause in section 92, "to be selected by the owner thereof." Where the land connected with the dwelling-house and residence of the debtor amounts to more than eighty acres, the excess is liable to execution, and some method must be adopted for reaching it. The statute gives the debtor the right to select his eighty, and does not allow the plaintiff in the execution, or any other party than the debtor, to say where such excess shall be taken. Or it may be, that where the debtor owned two dwelling-houses, situated on two separate tracts of land, he would be permitted to select between them.

That in the opinion, at least, of the legislature of 1860, the act of 1858 did not authorize the debtor to remove from the premises, is manifest from the fact that during the session of that year the legislature passed an act expressly authorizing the debtor to remove from the premises, without rendering them liable to sale on execution.

The judgment upon which the premises in question were sold was obtained in December, 1858. By section 77, Compiled Statutes, page 566, that judgment became a lien on all the real property of the judgment debtor in the county owned by him at the time of the judgment, or afterwards acquired. The court had occasion in *Folsom v. Carli*, 5 Minn. 383 [80 Am. Dec. 429], to give a construction to this statute, and there held that the lien attached to the homestead owned and occupied by the debtor as a residence, and that the exemption of the homestead was only an exemption from sale on execution, while occupied by the debtor or his family, but did not affect the lien of the judgment.

But it is claimed that the case of the plaintiff comes within the act approved March 10, 1860: Sess. Laws, 1860, p. 286. This act provides "that the owner of a homestead under the laws of this state may remove therefrom, or sell and convey the same, and such removal, or sale and conveyance, shall not render such homestead liable or subject to forced sale on execution or other process hereafter issued on any judgment or

decree of any court in this state, or of the district court of the United States for the state of Minnesota against such owner; nor shall any judgment or decree of any such court be a lien on such homestead for any purpose whatever."

It is admitted by the case that the premises were owned and occupied by the plaintiff as a homestead prior to the second day of April, 1860, and that upon said day he removed with his family from said premises to Chatfield, in said county, where he has ever since resided with his family. Consequently, if the act be constitutional, as applied to judgments obtained previous to its passage, the premises of the plaintiff, notwithstanding his removal therefrom, were not subject to sale on execution.

The judgment creditor Millard, upon the docketing of his judgment, obtained a lien upon the premises in question. He had thereby the right to sell these premises upon the happening of a certain contingency, to wit, when the premises ceased to be occupied by the debtor or his family as a homestead. This right was perfected in the defendant Millard, when the judgment was docketed, was then vested in him, without any further act to be done on his part. It was a valuable right, at least to some extent, and acquired by the use of the means allowed by law, and I do not think the legislature could lawfully deprive him of the power to exercise it, by any act passed subsequent to its acquisition. It has been held to be within the legitimate scope of legislative action to extend the time of redemption on the sale of mortgaged premises beyond the limit existing at the time the contract was made. But any law which prohibited the creditor from selling at all, or from in any manner obtaining possession of the premises upon which he held a mortgage lien, would doubtless be held to that extent unconstitutional and void. But this is precisely what the act in question does, save that the lien is in this case created by operation of law, instead of by the act of the parties. That, however, cannot alter the nature of the right, nor can the further fact that no definite time can be fixed for the happening of the contingency on which its exercise depends. It is sufficient to know that the contingency may happen at any time, and must happen at some time, either by act of the judgment debtor himself, or from the dissolution of the family relation in the usual course of nature. Unless this lien, and the right consequent upon it, can be said to be absolutely valueless, the legislature had no authority to destroy it. That a

homestead, trammelled with the restrictions of the act of 1858, would be of far less value to the owner than freed from them, needs no argument to prove. Many a judgment debtor would prefer to relinquish his homestead to his creditor rather than retain it at the price of a continued residence upon it. And ordinarily, it is probably true that the value of the homestead is increased to the judgment creditor in the same ratio as it is diminished to the debtor in consequence of the existence of the lien. As the construction of the law claimed by appellant would entirely destroy the remedy of the judgment creditor, so far as this property is concerned, I do not think it can obtain, and that the law has no application to judgments docketed and in force previous to its passage.

The only issue made by the answer is that the premises in question were not the homestead of the plaintiff at the time of the levy; the allegation in that behalf being that the defendants deny that "the land and premises described in the complaint was, on the thirtieth day of April, 1860, the homestead of the plaintiff or his family; or that at said time the said plaintiff was in the possession of the same; . . . and further say that on the second day of April, 1860, the plaintiff removed with his family from the premises above described, without the intention of returning thereto, or again occupying the same, and ceased to occupy the same as a residence and homestead, and has ever since said time, with his family, resided and still resides in the town of Chatfield." The appellant urges the objection that the allegation in the answer of an abandonment of the homestead by plaintiff is not proved. It is somewhat difficult to determine, from the informal manner in which the proceedings below are presented by the case, what was proved on the trial. The judge has not made any separate statement of facts found and conclusions of law thereon, as required by statute. But the judgment is not objected to by either party upon this ground. It appears from the case that the counsel for both parties agreed upon a certain statement, as evidence in the case, and upon such statement and the pleadings therein the court should give judgment in the action. After setting forth this evidence, it is stated in the case, "the court found upon the issues in said action against the plaintiff, and ordered that the same be made of record as upon motion by the plaintiff for a judgment upon the pleadings in said action. And upon motion of defendants' attorneys, the following order was made by the court therein:—

"The plaintiff in this action having in open court, by his counsel, Jones, Willard, and Jones, admitted that on the second day of April, 1860, the plaintiff removed with his family from the land and premises described in the complaint in this action, and had ever since that time resided in the town of Chatfield, and having moved the court upon the pleadings in this action for the judgment demanded in the complaint; after hearing, etc., it is adjudged and ordered that said motion be denied." It is then further stated: "The plaintiff and defendants, by their said attorneys, having stipulated that the court should render judgment upon the pleadings in this action, and the admissions aforesaid, it is also ordered and adjudged that judgment be rendered in this action for the defendants." Here are two different stipulations reported by the case: the first, that upon the statement of evidence and the pleadings the court should give judgment; and the second, that upon the admissions of plaintiff's attorneys in open court, and upon the pleadings, the court should give judgment. The admissions show the removal of the plaintiff and family from the premises on the second day of April, 1860, and his continued residence thereafter in Chatfield. The statement of evidence, if found true, is fuller as to the intent of permanent abandonment. From all the facts presented to this court, we think there was sufficient to justify the court below in finding the issue of the removal from, and abandonment of, the premises on the part of the plaintiff as proved, and that there was no error in rendering judgment for the defendants.

The judgment is affirmed.

ACTUAL USE AND OCCUPATION ARE NECESSARY TO CONSTITUTE HOMESTEAD AND TO EXEMPT IT FROM FORCED SALE: *Charles v. Lamberson*, 63 Am. Dec. 457, and note 463; note to *Walters v. People*, 65 Id. 735; extended note to *Fryer v. Stone*, 70 Id. 347, 348, 350.

HOMESTEAD IS SUBJECT TO LIEN OF JUDGMENT, in Wisconsin, and may be sold under execution after it has ceased to be such by the voluntary act of the judgment debtor: *Hoys v. Howe*, 62 Am. Dec. 705, and note 709; but that a judgment is not such a lien on a homestead as to enable it to be sold on execution, see cases cited in note to *Ackley v. Chamberlain*, 76 Id. 518.

STATUTES ENLARGING EXEMPTIONS OF PROPERTY from execution are constitutional: *Morse v. Gould*, 62 Am. Dec. 103; note to *Gooken v. Stonington*, 10 Id. 138.

THE PRINCIPAL CASE WAS CITED in *Ferguson v. Kunler*, 27 Minn. 159, and *Kelly v. Baker*, 10 Id. 156, to the point that the word "homestead" in the statute is used in its ordinary and popular sense, to designate a dwelling-place used and occupied as a home for its owner and his family, if he has one. It comprises fitness in the place for the uses of a home, which includes a

dwelling-house and more or less land connected therewith, and residence, use, and occupancy by the owner as a home for himself, and also for his family, if he has one. These are the essential tests of a homestead in fact: *Ferguson v. Kumlér*, 27 Id. 159. The principal case was cited in *Burwell v. Twiss*, 12 Id. 575, to the point that a judgment recovered prior to 1860 became a lien on a homestead, and that the law of 1860 making homesteads exempt from liens did not apply to judgments rendered before its passage. Where persons have distrained, and taken the property distrained upon into possession, before the passage of an act abolishing the remedy by distress, their rights under their distress are unaffected by such act: *Dutcher v. Culver*, 24 Id. 595.

BRIMHALL v. VAN CAMPEN.

[8 MINNESOTA, 12.]

LAW OF SISTER STATES ARE FACTS TO BE PROVED.

STATE WILL TAKE JUDICIAL NOTICE OF ITS OWN LAWS ONLY, and these enacted by the federal government.

COURTS OF ONE STATE WILL PRESUME THAT LAWS OF OTHER STATES are like their own, in the absence of proof to the contrary.

ACTION UPON NOTE EXECUTED ON SUNDAY cannot be sustained under the laws of Minnesota.

VIOLATION OF SUNDAY ACT IS CONTRA BONOS MORES, and will not be sustained by the courts.

ACTION UPON SUBSCRIPTION. — Where a valid subscription of funds towards the erection of a bridge, according to certain plans, specifications, etc., and payable on demand, has been made, an action will lie for the recovery of the subscription before the erection of the bridge.

WHERE SUBSCRIPTION OF FUNDS TOWARDS ERECTION OF BRIDGE HAS BEEN PAID, and the contractor has failed to erect the bridge, the contributor can maintain an action for damages for breach of the contract.

WHERE SUBSCRIPTION OF FUNDS TOWARDS ERECTION OF BRIDGE HAS NOT BEEN PAID, and the bridge has not been built as agreed upon, the failure to perform the contract may be pleaded in defense of an action for the sum subscribed, or in reply to it when offered as an offset.

NO ONE CAN CHANGE PURPOSE FOR WHICH SUBSCRIPTION WAS MADE, without the subscriber's consent.

DEFENDANT, Van Campen, gave his promissory note to Joseph Daniels for five hundred dollars and interest. The note was dated July 30, 1858, and was made in the state of New York, on Sunday. After maturity, it was, on November 16, 1858, indorsed and delivered to plaintiff, Brimhall, who sued upon it in the state of Minnesota. The facts were found by a referee. It seems that defendant, who was a road supervisor, was authorized by the county board of supervisors of the county of Goodhue to contract for the construction of a good suspension bridge over Cannon River, at the town of Cannon Falls, in Minnesota. The county authorities agreed

to pay one half the cost, not to exceed the sum of fifteen hundred dollars. The residue of the cost of construction said defendant had authority to raise by subscription of persons interested in the construction of the bridge. On April 10, 1858, Joseph Daniels put his name to said subscription paper for the sum of three hundred dollars. Daniels and the said road supervisor, Van Campen, then agreed that the bridge should be let to the lowest and best bidder, and that the same should be erected under a contract and specifications for the construction of the same according to the plan and model exhibited. The contract was awarded to Horace Scranton, who agreed to build such bridge according to the stated plans and specifications. On May 25, 1858, Scranton assigned his agreement and contract to Van Campen for a valuable consideration. Van Campen assumed, as assignee, to construct said bridge, but his construction was not according to specifications, was unworkman-like, and so defective that on or about October, 1858, the bridge broke down from its own weight. He thereupon abandoned the construction of a suspension bridge, and without the consent of said Daniels, proceeded to erect, in lieu thereof, a bridge with a center pier, not in accordance with said model. The referee found, as a conclusion of law, that said item for bridge construction was not a legal or proper matter of set-off. Judgment was directed to be entered for plaintiff on the note, subject to a set-off and deduction upon another matter of account and offset, of which no mention is necessary. The other facts are stated in the opinion.

George L. and E. A. Otis, for the appellant.

Daniels and Grant, for the respondent.

By Court, FLANDRAU, J. The referee finds as a matter of fact that the note upon which this action is founded was made in the state of New York, and that it was executed on Sunday. He does not find, as a further fact, what the law of New York upon the subject of contracts executed upon the Lord's day is, or whether it in any way differs from our own. The statute and common law of our sister states are facts to be proved, as any other facts in a cause, by the party who seeks to take advantage of any difference that may exist between such laws and our own. Our courts can take judicial notice of no laws but our own, and those enacted by the federal government. In the absence of proof concerning the laws of other states, the courts presume they are the same as our own, and decide ac-

cordingly. We had occasion to apply this very familiar rule in the case of *Cooper v. Reaney*, 4 Minn. 528.

The report of the referee, then, leaves a note executed on Sunday to be subjected to trial under the laws of this state. Our law is as follows: "No person shall keep open his shop, warehouse, or work-house, or shall do any manner of labor, business, or work, except only works of necessity and charity," etc., and then imposes a fine for the violation of its provisions: Comp. Stats., p. 730, sec. 19.

In the case of *Solomon v. Dreschler*, 4 Minn. 278, we considered the question of the validity of acts done in violation of statutory prohibitions. The various distinctions that have arisen upon such statutes are there pointed out, and the cases cited. We held that the proper rule is to "examine the statute as a whole, and find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so"; and under this rule we decided that liquor sold in violation of the license act could not be recovered for, because the act evidently was designed to protect the public morals, as well as to add to the public revenue. This Sunday act can have no other object than the enforcement of the fourth of God's commandments, which are a recognized and excellent standard of both public and private morals. A violation of the act, therefore, is *contra bonos mores*, and cannot be sustained by the courts. No action can be predicated upon a note made on Sunday.

In regard to the subscription of three hundred dollars, made by Daniels to the bridge, being a valid offset to the plaintiff's debt, we take this view. The subscription was valid, and being payable on demand, could have been recovered at once, even before the erection of the bridge. Had the subscription been paid, and the contractor failed to erect the bridge, the contributor would have had an action for damages for the breach of his contract. As the subscription was not paid, and the suspension bridge, towards which it was donated, was not built, as agreed, the failure to perform the contract can be pleaded in defense of an action for the sum subscribed, or in reply to it when offered as an offset. The referee having found that no suspension bridge was erected, he was right in relieving Daniels from the subscription. No one could change the purpose for which the subscription was made, so as to bind Daniels without his consent.

The judgment is reversed, and the case remanded to the district court, whence it came.

LAW OF SISTER OR FOREIGN STATES ARE FACTS TO BE PROVED; they will not be judicially noticed: *Blystone v. Burgett*, 68 Am. Dec. 658; *Gunn v. Howell*, 62 Id. 785; *Whidden v. Seelye*, 63 Id. 661; *Holloway v. Memphis etc. R. R. Co.*, 76 Id. 68; *Rape v. Heaton*, Id. 269; *Muhling v. Sattler*, 77 Id. 172, and notes to these cases.

DOMESTIC OR HOME STATE LAWS AND FEDERAL LAWS ARE JUDICIALLY NOTICED: See extended note to *State v. Twitty*, 11 Am. Dec. 780-785, on judicial notice of laws.

LAW OF FOREIGN OR SISTER STATE ARE PRESUMED TO BE SAME AS THOSE OF HOME STATE, in the absence of any proof to the contrary; and it is incumbent on the party relying on any difference to prove it: *Rape v. Heaton*, 76 Am. Dec. 269, and note 290; *Moore v. Hood*, 70 Id. 210; *Peabody v. Carrol*, 13 Id. 305.

NOTE OR BILL EXECUTED ON SUNDAY IS VOID: *Kepner v. Kefer*, 31 Am. Dec. 460; *O'Donnell v. Sweeney*, 39 Id. 336; *Allen v. Deming*, 40 Id. 179; *Adams v. Hamell*, 43 Id. 455; *Lovejoy v. Whipple*, 46 Id. 157; so is a contract: *Butler v. Lee*, Id. 230. At common law, acts performed on Sunday were valid unless expressly prohibited: *Amis v. Kyle*, 24 Id. 463; *Adams v. Hamell*, 43 Id. 455. The giving of a bill on Sunday was not prohibited, and was therefore not void on that account: *Kepner v. Kefer*, 31 Id. 460. But a contract made on Sunday is void, when a statute forbids it to be made on that day, though it be otherwise lawful: *Woodman v. Hubbard*, 57 Id. 310.

ACTION FOR MONEY SUBSCRIBED: *Homes v. Dana*, 7 Am. Dec. 55; note to *Knickerbocker Hotel Co. v. Coyle*, 58 Id. 714; *Edinboro' Academy v. Robinson*, 78 Id. 421, and note 423. Recovery may be had upon subscription, after work has been done and debts contracted upon faith of the subscription: See collected cases in note to *Hopkins v. Updeur*, 70 Id. 379; note to *Bridgewater Academy v. Gilbert*, 13 Id. 458; *Farmington Academy v. Allen*, 7 Id. 201. Party must pay amount subscribed after condition is complied with: *Spartanburg etc. R. R. Co. v. De Graffenreid*, 78 Id. 476; but where performance was not intended to precede payment, the subscriber cannot set up the failure of a performance of the condition, when sued upon his subscription: *Keller v. Johnson*, 71 Id. 355.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: All the authorities concur that the legislature may by law establish, as a civil and political institution, the first day of the week as a day of rest, and may prohibit, upon it, the performance of any manner of labor, business, or work, except only works of necessity and charity, and may prohibit anything which tends to injure the public morals, or disturb the peace and good order of the day: *State v. Ludwig*, 21 Minn. 206. A note made on Sunday is absolutely void in Minnesota: *Finney v. Callendar*, 8 Id. 43. The sale of a horse consummated on the sabbath is void, and no action will lie on the warranty in such sale: *Finley v. Quirk*, 9 Id. 199. The court below found that a horse was hired "on or about the eighth day of October, 1871," and ordered judgment for the defendant for his costs. "Strictly speaking, the court should, upon the evidence, have found distinctly and specifically, as a fact, that the hiring was upon Sunday, and as a conclusion of law, that therefore, by reason of the illegality of the contract, plaintiff could not recover": *Webb v. Kennedy*, 20 Id. 420. The principal case was summarized in *Capehart v. Van Campen*, 10 Id. 161.

RUTHERFORD v. NEWMAN.

[8 MINNESOTA, 47.]

PURCHASER OF LANDS ON WHICH THERE IS JUDGMENT AND MORTGAGE LIEN, WHO REDEEMS FROM SALE made in satisfaction of the judgment, which is the prior lien, and who afterwards obtains a sheriff's deed for the lands so redeemed, does not get the lands discharged of the mortgage lien, and cannot, therefore, prevent the mortgagee from foreclosing.

REDEMPTION BY JUDGMENT DEBTOR, OR HIS SUCCESSOR IN INTEREST, destroys the effect of a sheriff's sale, as such, and applies the money realized thereby as a payment upon the judgment, or other lien upon which the property was sold. Such redemption may be made without paying off prior liens; and all liens, prior and subsequent to the one from which the property is redeemed, remain unimpaired, except that the money paid on the sale or redemption operates as a payment *pro tanto* of the judgment.

THE facts are stated in the opinion.

William M. McCluer, for the plaintiff in error.

W. H. Burt, for the defendant in error.

By Court, **EMMETT, C. J.** The plaintiff below purchased lands upon which there was both a judgment and a mortgage lien. The lands having previously been sold at sheriff's sale to satisfy the judgment, which was the prior lien, the plaintiff redeemed them from such sale, and after the expiration of the statutory time for redemption obtained a deed therefor, from the sheriff. The defendant below, who was the owner of the mortgage lien, proceeded to foreclose the same by advertisement under the statute, whereupon the plaintiff commenced this action to restrain him and to quiet the title.

He claims that he is a redemptioner, within the meaning of the statute, and as such, stands in the same relation to the property as the purchaser at the sale. That he was entitled to, and has received, by the deed of the sheriff, the same title which was purchased at the sale; being the interest of the judgment debtor discharged of the mortgage lien, and that he now holds said property discharged of the mortgage lien (the mortgagee having neglected to redeem), just as the purchaser at the sale would have held it had there been no redemption.

The decision of this court in the case of *Warren v. Fish*, 7 Minn. 432, is equally decisive of this case. We there held that the grantee, or successor in interest in the lands of a judgment debtor, could redeem the lands from a sale on execution without paying off any liens which the party from whom he redeemed might have on them. That he redeemed upon the same terms as the judgment debtor, and that his redemption

does not have the effect of transferring to him the rights of the purchaser, subject to be defeated by other redemptions, but that it terminates the sale, and restores the estate to him in the same condition in which it would have been had no such sale been made, with all liens, prior and subsequent, unimpaired except that the money paid on the sale or redemption operates as a payment *pro tanto* of the judgment. In other words, that a redemption by the judgment debtor, or his successor in interest, destroys the effect of the sale as such, and applies the money realized thereby as a payment upon the judgment, or other lien upon which the property was sold.

This decision, it will readily be seen, fully covers the present case. And we must, therefore, affirm the judgment of the court below, overruling the demurrer to the defendant's answer.

LIEN OF SENIOR JUDGMENT LOST BY SALE OF PREMISES UNDER JUNIOR JUDGMENT AND EXECUTION: See note to *McMillan v. Richards*, 70 Am. Dec. 675, also citing cases to the contrary.

JUDGMENT DEBTOR HAS RIGHT TO REDEM BY TERMS OF STATUTE, notwithstanding he may have parted with all his interest in the land: See note to *Chatsquis Co. Bank v. Riley*, 75 Am. Dec. 361.

REDEMPTION OF LAND MUST BE ACCOMPLISHED BY STRICT COMPLIANCE WITH STATUTE: *Waller v. Harris*, 32 Am. Dec. 590. This case holds that a sale under a senior judgment, after the time of redemption expires, cuts off all junior judgments so that no further redemption can be made thereunder, or *ex virtute* thereof.

PURCHASER AT TAX SALE ACQUIRES LEGAL TITLE TO LAND, SUBJECT TO REDEMPTION by the owner, or some one having an opposing interest therein: *Byington v. Bookseller*, 74 Am. Dec. 279.

CITATIONS OF PRINCIPAL CASE.—One's redemption as owner annuls a sale, so that no title can pass to him by means of it. The purchaser's estate or interest is thereby defeated: *Horton v. Magitt*, 14 Minn. 293. A redemption by the successor in interest of a judgment debtor, does not have the effect of transferring to him the rights of the purchaser at the sale: *Smith v. Lewis*, 20 Wis. 355; in which it is held that where a second mortgagee of land purchases on foreclosure of his mortgage, he cannot acquire an absolute title, free from the lien of the first mortgage, through an assignment to him of an outstanding tax certificate, and a deed issued thereon. A redemption by the judgment debtor, or his successor in interest, destroys the effect of a sale as such, and applies the money realized thereby as a payment upon the judgment, or other lien, upon which the property was sold: *Standish v. Voelberg*, 27 Minn. 176. A foreclosure sale, which is annulled by redemption, never becomes complete; is not, after being so annulled, a sale; and can have no force or effect as a sale. It does not affect the lien of the mortgage for other installments of the mortgage debt: *Id.* 177.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

PAUL v. FULTON AND BROTHERTON.

[22 MISSOURI, 110.]

TRUSTEE'S POWER TO SELL.—PURCHASER'S TITLE.—Where trustee holds land in trust to convey one half thereof to a certain party upon request, or if no request is made for a conveyance, to sell the whole, and account to the party named for one half of the proceeds of the sale, the trustee may sell the whole tract, or any part of it, and such sale will be in conformity with the trust; and if no request is made for a conveyance during the lifetime of the trustee, at his death his representative takes the land upon the same trust, and if he sells, the purchaser acquires a good title discharged of the trust.

ACTION to recover one half of a certain tract of land, or the value thereof. Gabriel Paul and his children, and René Paul and his children, were tenants in common of said land. Under partition proceedings, René Paul became the purchaser thereof, and the land was conveyed to him. At the time of the sale in partition, there was a private agreement, reduced to writing, but never recorded, between the interested parties, the substance of which is set out in the opinion. Eight years subsequent to these proceedings, in 1846, Gabriel Paul died, leaving as heirs the present plaintiffs, his children. René Paul died in 1851, leaving a will, empowering and directing his representatives to sell the above-mentioned land. In 1852, Brotherton, as representative of René Paul, advertised and sold this land to Fulton. Upon these facts, the court held that Fulton was a trustee for the heirs of Gabriel Paul as to one moiety of the land; that Fulton should convey one half of the land to said heirs; that Brotherton should refund to

Fulton the purchase price of the land with interest; that plaintiff pay costs of suit. Fulton moved for a review, which motion was denied, and he appeals.

R. M. Field, for the appellant Fulton.

Lackland, Cline, and Jamison, for Brotherton.

Whittelsey, for the respondents.

By Court, BATES, J. In the finding of the facts by the court below, it was properly found (from the evidence as preserved) "that said René Paul held the land so purchased upon the trust to convey the half thereof to Gabriel Paul upon request, or if no request was made for a conveyance, to sell the same, and to account to said Gabriel Paul for one half of the proceeds of sale." This trust does not appear to have been founded upon a personal confidence in René Paul, for Gabriel retained a right to demand a conveyance of his interest, and a sale might be made only in default of such demand. Nor do any of the attendant circumstances indicate that the trust was merely personal. The prime object of the proceedings in partition, which terminated in the conveyance to René Paul, seems to have been to place the land in such condition that it could be readily conveyed to a purchaser if sale should be made of it. This object was well accomplished by vesting the title in René Paul; and if he had sold the whole tract, or any part of it, such sale would have been in conformity with the trust.

Gabriel Paul, too, if he had found an opportunity to sell his half, could have demanded a deed from René Paul, and thus been in condition to convey. No request for a conveyance having been made during the life of René Paul, at his death his representatives took the land upon the same trust as he held it, and his executor having sold the land, the purchaser acquired a good title discharged from the trust.

The declaration, therefore, of the court below that Fulton, the purchaser, became a trustee of the plaintiff for one half the land, and judgment in accordance with that declaration, were erroneous. Under the circumstances the plaintiffs may desire to amend their petition, so as to claim only of the executor of René Paul one half the purchase-money, and dismiss as to the purchaser of the land. The case will therefore be remanded.

The case as now presented to the court differs materially

from what it was when formerly before this court, as reported in 25 Mo. 157. Then the trust did not authorize a sale by the trustee. As now shown, the authority to sell is expressed.

Reversed and remanded.

BAY and DRYDEN, JJ., concurred.

ENGLISH v. BEEHLE.

[22 MISSOURI, 125.]

DEED TO MARRIED WOMAN vests title in her in fee, with absolute power of alienation, where it provides that the grantor transfers all right, title, and claim to the property to the grantee and her heirs, in a direct line, to have, manage, and dispose of, at her will and pleasure, as her property, free from any engagements or encumbrances which the husband might enter into; it being necessary that the property should remain as the property of the children, the heirs of the wife.

THE opinion states the facts.

Morehead, for the appellants.

By Court, BATES, J. This is a suit to recover possession of an undivided interest in a lot of ground in the city of St. Louis. The plaintiffs claim as representatives of one of the several children of Marianne Belford (*née* Guitarre). On March 31, 1810, Jean Latresse, being owner of the lot, executed a deed in the French language, which is translated as follows:—

“Know all men by these presents, that I, Jean Latresse, residing in the town and district of St. Louis, and territory of Louisiana, for the price and in consideration of the sum of one dollar, money of the United States, which has been well and duly paid me by Marianne Belford, by birth Guitarre; also, for other considerations, I have this day sold, ceded, relinquished, abandoned, and transferred, and by these presents I sell, cede, relinquish, and transfer to the said Marianne Belford, by birth Guitarre, all the rights, titles, actions, claims, and property which I have and can have in and to a lot [describing it] for the said Marianne and (*ainsique*) her heirs in a direct line, to have, manage, and dispose of (*enjouir, faire et disposer*) at her will and pleasure, and as of property belonging to her, and so that the said lot above sold may not be pledged, obligated, aliened, encumbered, and mortgaged to satisfy the engagements which Belford, the husband of the said Marianne, might enter into, it being necessary that the

said lot should always remain as the property of the children, the heirs of the said Marianne (*devant toujours le dit terrain sus vendu rester aux droits des héritiers enfans de la dite dame*)."

On the 27th of September, 1830, Marianne Belford, together with Francis Lafrance and wife, and Jean Latresse and wife, by deed, conveyed the same land to James Adams, said Marianne retaining the right of possession and use during her life.

Marianne Belford has since died; she had several children. In this case, the court, at the instance of the defendants, instructed the jury as follows:—

The deed from Jean Latresse to Marianne Belford, born Guitarre, read in evidence, vested all the title which said Latresse had in and to the premises therein described, in said Marianne Belford, in fee, and she had the power to convey the said title thereto absolutely. And the deed from said Marianne and others, read in evidence, and dated in 1830, conveyed said title to said James Adams.

The only questions for consideration arise upon the deed of Latresse to Marianne Belford. This deed evidently passed all the title which Latresse had in the premises, and it is contended on the one hand that the title so passed was vested in Marianne Belford in fee, with full power of alienation; whilst, on the other hand, it is contended for the plaintiffs that there was only vested in her a life estate, with remainder to her children. Accepting the translation of the deed given in evidence as correct, we are of opinion that the expressions which are relied upon as limiting the right of Mrs. Belford to a life estate are not such limitations. The reference to her heirs in a direct line in that part of the deed which directs how she shall have, manage, and dispose of the property, do not constitute her children purchasers; and being immediately followed by the statement of her power to dispose of the land at her will and pleasure, and as of property belonging to her, are no limitation upon her absolute power of alienation. The expression at the end of the deed—"it being necessary that the said lot should always remain as the property of the children, the heirs of the said Marianne"—is only an explanation of the reasons for creating a separate estate in the wife, not subject to the obligations of her husband.

Judgment affirmed.

BAY and DRYDEN, JJ., concurred.

DEED VESTS SEPARATE ESTATE IN WIFE, where it conveys the property to her "for her sole and separate use," and expressly excludes the marital rights of the husband, although the deed limits the property after her death to "the heirs of her body": *Bridges v. Bridges*, 60 Am. Dec. 495; see also *Ware v. Richardson*, 56 Id. 762; *Martin v. Bell*, 70 Id. 200. As to wife's power of alienating her separate estate, see *Holls v. Francois*, 51 Id. 760; *Calhoun v. Calhoun*, 49 Id. 667; *Keaton v. Scott*, 71 Id. 196; *Morrison v. Wilson*, 73 Id. 593; *Kirkpatrick v. Buford*, 76 Id. 363, and notes to these cases. The principal case is cited with approval in *Allen v. Olneybrook*, 52 Mo. 131, but distinguished in this, that while in the former case the land was conveyed to the wife and her heirs forever, with unlimited power in her to convey the same as her property at her pleasure; in the latter the property is secured in trust for the wife and her children, and no power is vested in her to dispose of it any more than such power is vested in the children.

MORTLAND v. SMITH.

[32 MISSOURI, 225.]

PLAINTIFF CAN RECOVER ONLY DAMAGES ACTUALLY SUSTAINED, in an action against an officer for carelessly and negligently accepting a delivery bond with insolvent and irresponsible securities, for property taken by him in a prior suit.

JUDGMENT IN ORIGINAL CASE, is evidence against officer only of the damages actually sustained by plaintiff, in an action by the latter against the former for taking an insufficient delivery bond for personal property taken in the original suit. In such case the original judgment is evidence against defendant that it was rendered.

THE opinion contains the facts.

A. M. and S. H. Gardner, for the appellant.

J. M. Krum, for the appellee.

By Court, BATES, J. A suit was brought in the St. Louis law commissioner's court for the recovery of personal property, by Graham against Mortland, the plaintiff in this suit.

Bond was given by the plaintiff in that suit and the property taken by the marshal of St. Louis County (the present defendant, Smith), and delivered to Graham. Graham suffered nonsuit, and judgment was rendered against him and his securities in the bond. Execution was issued and returned *nulla bona*.

The present plaintiff then brings this suit against the marshal, Smith, charging that he took said bond carelessly, negligently, and without due inquiry as to the solvency and responsibility of said securities; and did not require them to make oath as to their solvency or responsibility. The plaintiff

averred that, by means of the carelessness and negligence of the defendant in taking said bond, he had wholly lost said property and the value thereof, and his costs and charges in said suit, and asked judgment for the damages so sustained.

At the trial, the court properly instructed the jury as to the general liability of the defendant, but erred in refusing an instruction having reference to the amount of damages to be recovered. There was evidence given that the parties to the original suit, before judgment therein, had made an agreement under which the plaintiff paid the defendant a sum of money, and the defendant voluntarily gave up the property (staves) to the plaintiff. The defendant thereupon asked the court to give to the jury this instruction:—

“If the jury find from the evidence that, after the execution of the order of delivery for the property in question, an agreement was made between the plaintiff in this suit and Thomas Graham, that, if said Graham would pay the freight and charges on the staves in question, he, said Graham, could have them; and that under said arrangement said Graham, did pay said freight and charges, and received said staves,—then plaintiff cannot recover for the value of said staves.”

The defendant is only liable for the damage actually sustained by the plaintiff; and if he really had not lost the staves and their value, he could not recover on account of them. The instruction should have been given.

The judgment rendered in the original case was evidence against defendant that such judgment had been rendered; but was not evidence against him of the amount of damage sustained by the plaintiff.

In the court below, judgment having been given against the defendant, it will be reversed and the cause remanded.

BAY and DRYDEN, JJ., concurred.

EINER v. BESTE.

[82 MISSOURI, 240.]

ASSIGNMENT FOR BENEFIT OF CREDITORS under insolvent laws of another state, vests such title in the assignee as to property of the debtor situated in Missouri, as to defeat an attaching creditor who is a citizen of and resides in such other state, but sues in the courts of Missouri to gain a preference over creditors in the other state, where all of the parties reside, and where the debt sued upon was contracted and made payable.

AM. DEC. VOL. LXXXII—9

THE opinion states the facts.

A. J. P. Garesché, for the defendants and appellants, and the interpleader.

McClelland, Moody, and Hillyer, for the respondents.

By Court, *BAY, J.* Plaintiffs sued defendants by attachment in the St. Louis circuit court, returnable to the September term, 1858, predicated upon an affidavit alleging that the defendants were non-residents. A debt due defendants from a third party, in the city of St. Louis, was attached, and said party summoned as garnishee. Defendants, in their answer, aver that at the time of the institution of this suit, and at the time the debt sued on was contracted, both plaintiffs and defendants were, and still are, residents of the state of Louisiana, and that the debt was contracted in the state of Louisiana. That by the laws of said state, plaintiffs could not maintain their action for the recovery of said debt, because said defendants were insolvent, and had, before the institution of this suit, instituted proceedings in a court of competent jurisdiction in the city of New Orleans for their discharge under the insolvent laws of that state, which proceedings were still pending and undetermined.

Joseph Deynood interpleaded in the cause, claiming the property attached as the legal owner and proprietor thereof, by virtue of his appointment as syndic (a word used in the French law answering to our word assignee) of defendants.

On motion of plaintiffs, the court below struck out the answer of the defendants. The plaintiffs, in their answer to the interplea, deny that Deynood is the owner of the property attached, and aver a want of any knowledge or information sufficient to form a belief as to whether he had been appointed in due form of law syndic, as stated in the interplea. And upon these issues the parties proceeded to trial, a default in the mean time having been taken against the defendants. The case was tried by the court, sitting as a jury, and judgment given against the interpleader, to reverse which he appeals to this court.

Upon the trial it was admitted that all the parties except the garnishee were residents of Louisiana, and that the debt sued on was contracted in Louisiana. It also appeared in evidence that plaintiffs had notice, before the institution of their suit, of the proceedings in bankruptcy, a transcript of which was also read in evidence. By the laws of Louisiana

relating to bankruptcy, the syndic is selected and appointed by the creditors, who, for that purpose, meet at a time and place specified in the order of the court. The code defines with much particularity the powers and duties of the syndic; and after declaring that the property of the debtor shall not be liable to be seized, attached, taken, or levied on by virtue of any writ of seizure, attachment, or execution, issued against such property, provides that the syndic shall take possession of and be entitled to claim and recover such property, and to administer and sell the same. It further declares that the surrender shall operate to discharge the debtor from all personal restraint, and to suspend all kinds of judicial process against him. Other articles of the code are incorporated in the bill of exceptions, but it is deemed unnecessary for the purposes of this case to make any special reference to them.

The question raised by the record in this case is, whether the proceeding in bankruptcy so vested the property and effects in Missouri in the syndic as to defeat an attaching creditor residing in the state of Louisiana, but suing in the courts of Missouri.

The defendants asked several instructions contending for the affirmative of this proposition, which the court refused to give, assuming the converse of it to be true.

The general rule that personal property has no location, but follows, as to its disposition and transfer, the law of the domicile of the owner, is universally admitted, but the rule is subject to several exceptions. It will not prevail in cases where its application would be prejudicial to the state where the property is found, or the just rights of its citizens, nor has its application been admitted in all cases of voluntary assignments for the benefit of creditors; for when in such cases a contest has arisen between the assignee and an attaching creditor in another state, seeking to avail himself of the property of the debtor in such state, the courts have generally favored the attaching creditor, upon the principle that it is the duty of the state to protect its citizens with reference to property within its jurisdiction. Nor does the rule apply, except as hereinafter stated, to cases of involuntary assignments under bankrupt laws. In England, it is true, it has been uniformly held that the operation of bankrupt laws is to vest in the assignees all the personal property of the bankrupt, wherever it may be situate, and consequently, that an attachment and recovery of such property made by a creditor in a foreign

country after such assignment is inoperative, upon the principle that the title which is prior in point of time ought to obtain preference in point of right and law: Story on Conflict of Laws, 408; *Hunter v. Potts*, 4 Term Rep. 192.

But in this country the adjudications have been otherwise; and although we have permitted, in some instances, assignees of bankrupts in England to sue in our courts for the recovery of the personal effects of the bankrupt, yet, it has been confined to those cases in which no right or claim to the property was set up by a citizen or American creditor, and the permission so granted was expressly placed upon the doctrine of comity, and not upon any legal or international right supposed to exist in the assignee.

Notwithstanding the want of unanimity in the early American cases, the rule is now considered well settled, and is thus stated by Judge Story in his Conflict of Laws, 411:—

“There is a marked distinction between a voluntary conveyance of property by the owner and a conveyance by mere operation of law in cases of bankruptcy *in invitum*. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property, except that which is within its own territory.”

Parsons, in his work on mercantile law, 312, says:—

“We hold in this country that the bankrupt and insolvent laws form a part of the law of nations in no sense and in no respect; that they not only derive all their force from the authority of the state which enacts them, but have no force whatever—no more than any other local and municipal law—beyond the limits of that sovereignty. So, too, our courts hold that the cession of the bankrupt's assets to his assignee is not to be regarded as his own act, but rather as the result of, and effect of, his civil death. He has, as a merchant ceased to be. He has no longer anything to do with his property, and does not possess and cannot exercise any more right or power in respect to it than a mere stranger. And the principle on which his assets are to be gathered and distributed is the same which would be applied if he had died insolvent, and an administrator, instead of an assignee, had possession of his property. Hence, it follows that within the state where insol-

venency goes into effect it operates on all the property in the same way that insolvency declared by probate would operate on the effects of a dead man,—that is, only within the state where it occurs, leaving creditors under other jurisdictions to get hold of other assets if they can.”

The rule thus stated, denying to the insolvent or bankrupt laws of a state any extraterritorial operation, is by no means without a qualification, for upon an examination of the decisions which maintain and support the rule, and upon the faith of which the principle is held to be settled, it will be found that a distinction or reservation is made with respect to parties who reside in the state where the proceeding in bankruptcy is had. The question of residence of parties seeking to appropriate the assets of the bankrupt is regarded as very material. In *Milne v. Moreton*, 6 Binn. 353 [6 Am. Dec. 466], Chief Justice Tilghman refers to the ruling of the English courts, wherein it is held “that if an inhabitant of England attaches the property of an English bankrupt in foreign parts, and thus obtains payment, he will be compelled to refund the money in an action by the assignee, because, residing in England, and bound by the law of his country, it is against equity that he should defeat the object of that law, which is the placing of all creditors on an equal footing.”

In the same case, the learned judge says: “In this [Pennsylvania] state we have permitted English assignees to bring actions in the name of the bankrupt for their own use, and we have held that, between British subjects, a discharge under an English commissioner is a bar to an action here.”

In the same case, Judge Yeats remarked: “It is one thing to assert that assignees of bankrupts under foreign institutions should be allowed by the courtesy of nations to support suits as the representatives of such bankrupts for debts due to them; and it is another thing to give efficacy to these institutions, to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owed allegiance, and from whom they were entitled to protection.”

So in *Mulliken v. Aughinbaugh*, 1 Penr. & W. 117, and in *Lowry v. Hall*, 2 Watts & S. 130, it was held that an inhabitant of Maryland would not be allowed to attach a debt in Pennsylvania, which the creditor in Maryland had assigned to obtain a discharge from arrest under the insolvent laws of that state.

So in *Sanderson v. Bradford*, 10 N. H. 260, the supreme court of New Hampshire held that a general assignment of property for the benefit of creditors by a citizen of Massachusetts, in conformity with the insolvent laws of that state, will operate to transfer a debt due from a citizen of New Hampshire as against creditors of the assignor who are citizens of Massachusetts. Parker, C. J., in delivering the opinion of the court, said: "The creditors in this case are citizens of a foreign government [Massachusetts], and have no particular claim to the benefit of our laws, if there is any conflict between them and the laws of Massachusetts. Their demand against Bradford does not appear to have been made payable here, nor is there anything to show that they contracted with any reference to the laws of this state. Property situated in this state, or debts due here, cannot be supposed to have been the means to which they looked for payment in any event, when the debt was contracted; and no reason suggests itself why they should stand in any better situation than creditors of Bradford who are citizens of Massachusetts."

So in *Whipple v. Thayer*, 16 Pick. 25 [26 Am. Dec. 626], which was an assignment by a citizen of Rhode Island for the benefit of his creditors, the validity of which was questioned by reason of its conflict with the laws of Massachusetts, Shaw, C. J., said:—

"Without at present deciding the more general question whether this assignment, made by the owner of property, in a mode conformable to the laws of the place of his domicile, would be good against a subsequent attachment made by a citizen of this state, the court are all of opinion, that as against a citizen of Rhode Island, the assignment was good."

The case of *Daniels v. Willard*, 16 Pick. 38, is to the same effect.

In *Van Hook v. Whitlock*, 26 Wend. 43 [37 Am. Dec. 246], the supreme court of New York admitted the doctrine to be that, as between citizens of the same state, the insolvent's discharge is valid, as it affects contracts made posterior to the law; but as against citizens of other states it is void as to all contracts wherever made.

In *Beer v. Hooper*, 32 Miss. 246, decided by the high court of errors and appeals of Mississippi, in October, 1856, plaintiff was a citizen of Pennsylvania, and sued out an attachment in the state of Mississippi against Beer & Co., of New Orleans, Louisiana, and attached a debt due to Beer & Co. from a citizen of Mississippi.

The defense set up was, that prior to the attachment, Beer & Co. had made a voluntary surrender of their effects (embracing the debt attached), under the insolvent laws of Louisiana, to the sixth district court of that state, and that one A. Beer had been appointed syndic. Beer, as syndic, claimed the debt due by the garnishee. The attachment was taken out on the 24th of May, 1855. The surrender and appointment of syndic were made on the 21st of May, 1855. Judgment was given for the plaintiff sustaining the attachment, and the court of appeals affirmed it, upon the ground that the plaintiff was not a resident of Louisiana, and therefore not bound by the laws of that state, or owing any allegiance thereto.

A very late case, decided in the supreme judicial court of Maine in 1860, *Felch v. Bugbee*, 48 Me. 9 [77 Am. Dec. 203], raises the same question. The court decided that an assignment of a debtor's property, under the insolvent laws of Massachusetts, will not operate upon debts or property in Maine so as to defeat the attachment of a creditor, who is a citizen of Maine, made subsequently to such assignment. The learned judge, in delivering the opinion of the court, thus speaks of the rule:—

“After a careful consideration of the reasonings and decisions of the courts on this vexed question, we can only say that if the question was an open one in all respects, we might incline to the doctrine that the place of making and place of performance should control, on the grounds before stated, rather than the fact of citizenship. Yet we are forced to the conclusion that a different rule has been finally established by the supreme court of the United States and concurred in by most of the state courts; and we are not disposed to depart from the rule thus established. It rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a state as local, having no extraterritorial force so as to act upon the rights of citizens of other states; that as between citizens of the state, the discharge will bind them as to all posterior contracts wherever made or wherever to be executed; and as to citizens of other states, it will not discharge any existing contract, although made or to be performed in the state granting the discharge. This rule is broad enough to exclude all questions arising either from the place of making or place of performance. It rests entirely in the citizenship of the parties, and treats all other matters as immaterial.”

We might cite numerous other cases in which it is held that the question of citizenship is not only important, but in many respects controlling; but enough has been given to show the general current of authority.

If it was an open question, we should be inclined to adopt the doctrine as founded in good sense, for we think no good reason can be urged why a creditor residing in the same state with the bankrupt, and subject to its local jurisdiction, should be permitted, through the courts of another state, to obtain an advantage over other creditors, by seizing, through legal process, the effects of the bankrupt in such state. To do so, would be conferring upon him a right which is denied him by the laws of his own state.

In the case at bar, the plaintiffs were residents of Louisiana at the time the debt due them was contracted, and at the time of instituting the proceeding in bankruptcy, and as admitted by counsel, are still residents of that state. The debt sued upon was contracted and made payable in Louisiana, and with reference to the local law of Louisiana. They, furthermore, had notice prior to the institution of this suit of the proceeding in bankruptcy, and their demand appears in the schedule of debts due by defendants. They cannot, therefore, be permitted to obtain, through the instrumentality of our courts, a priority over other creditors. A question may arise as to whether they may not be entitled to attach a part of the fund, as it does not appear very satisfactorily from the record whether the application for the benefit of the bankrupt law was made by Beste alone, or by both him and his partner; nor does it appear whether the debt attached was due Beste individually, or the firm of Beste and Grima, the answer of the garnishee being omitted in the record. These questions seem to have been overlooked upon the trial below, which makes it necessary to remand the cause.

Judgment reversed, and cause remanded, the other judges concurring.

INVOLUNTARY ASSIGNMENT FOR BENEFIT OF CREDITORS, extraterritorial effect of: *Walters and Walker v. Whitlock*, 76 Am. Dec. 607, and note 616; note to *Hanford v. Paine*, 78 Id. 594 et seq.

THE PRINCIPAL CASE IS CITED and followed as to the doctrine there enunciated, in *Einer v. Deynoodt*, 39 Mo. 69; *Thurston v. Rosenfeld*, 42 Id. 481; *Ashew v. La Cygne Bank*, 83 Id. 369.

FARRELL'S ADMINISTRATOR v. BRENNAN'S ADMINISTRATRIX.

[32 MISSOURI, 323.]

ONUS IS UPON PARTY ATTACKING WILL when its formal execution is admitted, and it has been admitted to probate, but it is sought to set it aside on the ground of incapacity in the testator.

ERROR AS TO WHO SHOULD BE ALLOWED TO OPEN AND CLOSE a case furnishes no ground for a new trial, and the verdict will not be disturbed on that account, unless it is shown that the party has been materially prejudiced thereby.

DEPOSITION OF CONTENTS OF LETTERS IS INADMISSIBLE without proof accounting for their absence, nor evidence showing any effort to produce them.

ALTHOUGH OPINION OF WITNESS AS TO SANITY of a testator is admissible, the question, "From your knowledge of him, would you think his mind sound enough to make a will?" is objectionable, as it involves a question of law for the court to determine, and not the witness, as to the *quantum* of mental capacity necessary to enable a party to make a legal disposition of his estate.

THE opinion states the facts.

A. J. P. Garesché, for the appellant.

R. M. Field, for the respondents.

By Court, *BAY, J.* Plaintiff filed his petition in the St. Louis circuit court, under our statute of wills, to contest the validity of an instrument of writing purporting to be the last will of Michael Farrell, deceased. The petition alleges that at the time of the execution of the said supposed last will and testament the said Michael Farrell was not of sound and disposing mind, and by reason thereof incapable of making a will. This is the only issue presented by the pleadings in the cause.

The trial was by jury, and a large amount of evidence was given relating to the condition of the testator's mind. The court gave several instructions, and refused several asked by plaintiff, but as no point was made with reference to them, we proceed to notice the grounds relied upon by plaintiff for a reversal of the judgment.

1. It is insisted that the court erred in allowing the defendant the opening and closing of the testimony and argument.

This point was made in *Cravens v. Faulconer*, 28 Mo. 19. That was a proceeding under our statute to contest the validity of a will, and Judge Richardson, in delivering the opinion of the court, contended that the *onus* was upon the defendant, and

consequently that he had a right to open and close the case. However important it may be to observe uniformity upon all questions of practice, yet we are not satisfied with the rule laid down in that case. The authority cited in support of it is 1 Greenl. Ev., sec. 77; but the rule as there laid down is in reference to the probate of a will, and the authorities cited in Greenleaf all relate to the probate of a will, in which an appeal was taken from the probate court, and a trial *de novo* had. In such cases the *onus* must be upon the party seeking to have the will probated, and he should have the right to open and conclude the case; but this is a statutory proceeding to contest the validity of the will upon the ground of incapacity in the testator, and can be only instituted after the will has been probated. The petition admits the formal execution of the will, and that it has been in due form admitted to probate, but seeks to set it aside upon the ground above stated. The *onus*, therefore, must be upon the party attacking the will. But as this is a question of practice, an error of the court relating thereto furnishes no ground for a new trial, nor will we disturb the verdict on that account, unless satisfied that the party has been materially prejudiced thereby.

The next point made by the appellant is that the court erred in excluding from the jury a part of the deposition of one John Roddy, in which the deponent undertook to state the contents of certain letters addressed by Michael Farrell, in his lifetime, to his father in Ireland.

There was no proof in the case accounting for the absence of the letters, nor any evidence to show that plaintiff had made any effort to produce them; the deposition was, therefore, clearly inadmissible.

The third ground assigned for error is that the court refused to permit plaintiff to put a question to the witnesses in the following form:—

“From your knowledge of him, would you think his mind sound enough to make a will?”

The question is objectionable, as tending to elicit from the witness his opinion as to the *quantum* of intelligence or mental capacity that is necessary to enable a party to make a legal disposition of his estate. In other words, it involves a question of law for the court to determine, and not the witness.

Witnesses who have had opportunities for knowing and observing the conversation, conduct, and manners of the person whose sanity is in question may depose, not only to particular

facts, but to their opinions or belief as to the sanity of the party formed from actual observation: See 1 Jarman on Wills, 75.

The appellant, in this case, seems to have concluded that in sustaining the objection to the question in the form propounded the court intended to hold that opinions of witnesses upon the question of the testator's sanity were inadmissible; but it is very evident that such was not the ruling of the court, for nine tenths of the record are taken up with the opinions of witnesses on both sides, and the reasons for such opinions. All of which the jury had in evidence before them.

The other judges concurring, the judgment will be affirmed.

BURDEN OF PROOF IS UPON PARTY seeking to impeach the will, when he admits its execution, but sets up incapacity in the testator: *Taylor v. Wilburn*, 64 Am. Dec. 186, and note 189.

REFUSAL OF COURT TO GIVE DEFENDANT opening and close of case, when no ground of appeal, nor assignment of error: *Goodpaster v. Voris*, 74 Am. Dec. 313. As to right to open and close generally, see *Benham v. Rowe*, 56 Id. 342. The principal case is cited and approved in *Lucas v. Sullivan*, 33 Mo. 391, to the point that the ruling of the court as to a party's right to open and close the case, is no ground for reversal, unless it is shown that such ruling was an injury to such party. This rule is affirmed in *Harvey v. Heirs of Sullens*, 56 Id. 373, where the principal case is cited, and the Missouri cases on the subject collected and compared. In *Tingley v. Conzill*, 48 Id. 295, the ruling in the principal case is doubted, and that held in *Cravens v. Faulconer*, 28 Id. 19, cited and given as to this point in the principal case, is adhered to. The rule maintained in the principal case, that an error committed by the court below as to the right to open and close, which works no injury, is not ground for reversal, is the law of Missouri, as shown by the late case of *Harvey v. Heirs of Sullens*, *supra*. But this and the cases above cited agree that where a will is attacked on the ground of incapacity in the testator, the burden of proof is cast upon defendants, who are seeking to establish the will, and they are entitled to open and close the case.

DEPOSITION OF CONTENTS OF WRITTEN INSTRUMENT is not admissible, unless the original is lost, destroyed, or otherwise accounted for: *Fisk v. Tank*, 78 Am. Dec. 737, and note 751, showing when secondary evidence of written instrument is inadmissible: See also *Fletcher v. Jackson*, 56 Id. 98; *Jones v. Robinson*, 54 Id. 212, and notes to these cases. Contents and terms of written instrument are inadmissible without proof that the writing cannot be produced: *Price v. Hunt*, 59 Mo. 262, citing the principal case.

ADMISSIBILITY OF OPINIONS OF WITNESS as evidence concerning capacity of testator: See *Rambler v. Tryon*, 10 Am. Dec. 444, and note; *Potts v. House*, 60 Id. 329, and note 360.

In *Harris v. Hays*, 53 Mo. 93, the ruling in the principal case, that when a will is contested after probate, the burden of proving incapacity in the testator is upon the contestant, is doubted, and it is there held that the better practice is to regard the proceedings as being *in rem* where it is sought to establish a will, and to require formal proof of its execution from the proponent, even after it has been admitted to probate.

CECIL v. SPURGER.

[32 MISSOURI, 432.]

VENDOR IS GUILTY OF FRAUD WHICH MAY BE PLEADED as defense to an action for the price of the property sold, when it has a latent defect of which he is aware, but which he fails to disclose to the vendee, though he knows that the latter is acting upon the supposition that no such defect exists. In this case, it is error to strike out an answer setting up such defense.

THE opinion contains the facts.

Ryland and Son, for the respondent.

By Court, DRYDEN, J. This is a suit brought to foreclose a mortgage, given to secure the payment of a note for \$305, made by Spurger to Cecil, administrator of Eckols. The note was given, it would seem, for the price of a negro belonging to the estate of the plaintiff's intestate, sold by Cecil, as administrator, to the defendant. The defendant filed his answer to the amended petition, which, on motion of the plaintiff, was stricken out for insufficiency, and a final judgment rendered for the debt and for the foreclosure of the mortgage, from which the defendant appealed to this court.

The material part of the answer is as follows: "The defendant further says that the said plaintiff, before and at the time of the sale of said slave, knew that said slave was unsound and diseased, and very old and worthless; and said plaintiff knew, before and at the time of said sale, that the defendant believed said slave to be sound and free from disease, and only about forty-eight years old; and defendant did not know of said unsoundness or disease, or age of said slave; and said plaintiff so knowing that defendant labored under such belief, did not, at any time before or at said sale, disclose to defendant the fact that said slave was unsound and diseased, and much older than forty-eight years, to wit, of the age of seventy years; and said plaintiff fraudulently concealed said unsoundness and disease of said slave, and his age; and said defendant avers that at the time of the sale of said slave, said slave was unsound and diseased, and over the age of forty-eight years, and was wholly worthless; and said slave, within about three weeks after defendant purchased him, died of said unsoundness, disease, and old age, and was wholly lost to defendant; wherefore," etc.

What sort of case the evidence may disclose when the parties come to a trial, we of course cannot foresee; nor have we

anything to do with that matter. For the purposes of the question raised by the motion to strike out, we are obliged to take the material allegations of the answer to be true; and if they are found to constitute a defense, the judgment must be reversed; otherwise, it will be affirmed.

Where a vendor sells property having a latent defect, of which he knows, but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defense to an action for the price of the property: *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Id. 530.

The answer in this case comes within the above rule, and the same was, therefore, improperly stricken out. Let the judgment of the circuit court be reversed, and the cause remanded, to be proceeded in, in conformity with this opinion.

FRAUD, VENDOR WHEN GUILTY OF, in not disclosing latent defect in the chattel sold: See *Brown v. Gray*, 72 Am. Dec. 563, and note 566.

FRAUD, WHEN MAY BE PLEADED IN DEFENSE: See *Ross v. Brayton*, 26 Am. Dec. 445; *Saunders v. Stotts*, 27 Id. 263, and note 266; *Hildreth v. Tomlinson*, 50 Id. 510.

RAILEY v. PORTER.

[22 MISSOURI, 471.]

FORWARDING MERCHANTS ARE BOUND to give advice to the consignee of the shipment made to him, and the liability of the carrier to deliver according to the bill of lading does not discharge them, although they may have been prevented from getting bills of lading in triplicate by the misconduct of such carrier.

ACTION to recover the value of a quantity of hemp seed alleged to be lost by plaintiffs through the carelessness and negligence of defendants, who were commission and forwarding agents. In March, 1857, plaintiffs sent the seed to defendants to ship it to C. O. Wallace, at Lexington. Defendants shipped the seed on April 4, 1857, by boat A. C. Godlin, and took but one bill of lading, by which said boat agreed to deliver the seed to C. O. Wallace at the above address. This the boat failed to do, but delivered it to T. B. Wallace, who, not knowing to whom it was consigned, kept it until the sowing season was past, and it was subsequently sold for freight and charges. The evidence tended to prove that an endeavor

had been made by plaintiffs to ascertain what had become of the seed, but that in this they failed. Defendants do not pretend that they gave any notice to C. O. Wallace of the shipment of the seed. They admit that they took but one bill of lading, but insist that this was all that was required of them as forwarding agents. The court declared that the law made it the duty of forwarding merchants to take triplicate bills of lading of shipments made by them, one to be sent by them to the consignee, one to be delivered to the carrier, and the other to be retained by them. On motion of defendants, the court declared that if they received the seed in dispute to be shipped to C. O. Wallace at Lexington, and within reasonable time thereafter did ship the same, taking from the carrier a bill of lading signed by the proper officer, whereby the boat agreed to deliver the seed to the above-named party at Lexington, and the carrier refused to wait until triplicate bills of lading could be signed, then the carrier was liable for the non-performance of the agreement contained in such bill of lading, and that the liability of defendants ceased when that of the carrier commenced. Plaintiffs duly excepted, and now appeal.

Chrisman and Comingo, and R. L. Y. Peyton, for the plaintiffs in error.

Ryland and Son, for the defendants in error.

By Court, BATES, J. The instruction given for defendant was wrong.

Notwithstanding that the forwarding merchants may have been prevented by the misconduct of the officers of the boat from getting three bills of lading in the usual manner, they yet were bound to give advice to the consignee of the shipment made to him, and the liability of the boat does not discharge them from liability.

Judgment reversed and cause remanded.

BAY and BRYDEN, JJ., concurred.

THE PRINCIPAL CASE IS CITED, in *Edwards on Factors and Brokers*, 116, to sustain the proposition "that it is the agent's duty to keep his principal advised of all important facts and transactions relating to the business; unless he does so, he renders himself liable for all damages arising to his principal for his neglect."

RUBEY v. HUNTSMAN.

[32 MISSOURI, 501.]

PARTY CLAIMING LAND UNDER TAX SALE can maintain his title only when the law has been strictly pursued; therefore, when such sale is made within the court-house, under a statute requiring that it shall take place "before the court-house door," it is void, and passes no title.

THE opinion states the facts.

Reid and Denny, and Porter, for the appellant.

Burckhardt, for the respondent.

By Court, BATES, J. This is a suit for damages for trespass to land, apparently prosecuted and defended for the purpose of trying the title to the land, both parties claiming title. Judgment was given for the plaintiff. The plaintiff having shown a *prima facie* case of title, the defendant set up a title under a tax sale, and the plaintiff gave evidence tending to impeach the validity of that tax title. The defendant, to show his title, gave in evidence a deed made to him by the register of lands, dated the eleventh day of February, 1857, and which was filed for record on March 2, 1857. That deed recited the sale made by the collector of Randolph County, on the first Monday of October, 1846, "before the court-house door of said county." The plaintiff then proved that the sale was made inside the court-house, and not "before the court-house door of the county."

The court below, by instructions given, decided in effect that the making the sale within the court-house, and not "before the court-house door," was such a failure to comply with the law as to make the sale void. We think that the court did not err in so deciding. The ninth section of the fifteenth article of the act concerning revenue (R. C. 1845, p. 949) provides that the sale shall be made "before the court-house door of the county." It is well established in this state that a person claiming to hold land under a sale for taxes can only maintain his title when the law has been strictly pursued. It is immaterial whether it was more convenient to all persons, or better in any respect to sell within than before the court-house; the law has prescribed the place of sale, and that is the only proper place; and it is so because the law has said so, and there can be no reasoning about it: *Reeds v. Morton*, 9 Mo. 868; *Donohoe v. Veal*, 19 Id. 331; *State ex rel. Donohoe v. Richardson*, 21 Id. 420.

The defendant also set up length of possession in himself as a bar to the plaintiff's right of action, but no evidence was given of actual possession by him.

The judgment of the court below is affirmed.

BAY and DRYDEN, JJ., concurred.

TAX SALE IS VOID, unless all substantial requirements of the statute are shown to have been strictly complied with: *Wallace v. Brown*, 76 Am. Dec. 421, and note 427. In *McNair v. Jensen*, 33 Mo. 312, the principal case is cited, approved, and followed. The former case involved exactly the same facts as the latter.

SALLEE v. ARNOLD.

[32 MISSOURI, 532.]

CHOSE IN ACTION IS THING of which one has not the possession, or actual enjoyment, but only a right to, or a right to demand by action at law. Or it is defined to be a personal right not reduced to possession, but recoverable by suit at law.

HUSBAND ACQUIRES NO RIGHT to wife's chose in action unless he reduces it into his possession during the coverture.

SLAVES BELONGING TO WARD, in the possession of her guardian, are in the possession of the ward. Guardian acts in mere fiduciary capacity, and is the agent of the ward in all matters relating to the trust property.

POSSESSION OF BAILEE IS POSSESSION OF BAILOR; so held where slaves belonging to a ward had been hired by her guardian to the bailee for a year. Also held that such possession of the guardian was the possession of the ward.

SLAVES BELONGING TO WARD in the possession of her guardian or his bailee, are in the possession of the ward, and upon her marriage her possession is transferred to her husband, who may maintain suit for them after her death, although he has never had actual possession.

THE opinion states the facts.

Knott and Hough, and Ryland and Son, for the appellants.

Ansell and Gardenhire, for the respondents.

By Court, BAY, J. Plaintiff brought suit against the defendants, in the Callaway circuit court, to recover possession of seven slaves,—Prudence, Greene, Creed, Amanda, Laura, Margaret, and an infant, name unknown,—of the value of three thousand two hundred dollars. The cause was submitted upon an agreed statement of facts as follows:—

“Prudence, Greene, and Creed, originally belonged to the estate of Thomas Swearingen, deceased, of Montgomery County, in this state, who died in the year 1850. Letters of adminis-

tration were taken out upon his estate, and in 1854, commissioners were appointed by the county court of Montgomery County to divide the slaves of the intestate among his widow and heirs, and the slaves Prudence, Greene, and Creed were assigned to Lydia Ann Swearingen, a daughter of the said Thomas Swearingen.

"William Arnold, one of the defendants, was the guardian of the person and estate of the said Lydia Ann, she being a minor, and took possession as such guardian of said slaves, Prudence, Greene, and Creed. Arnold was also guardian of two other minor heirs of the said Thomas Swearingen, and took possession of the slaves assigned them by the commissioners at the same time, and gave one bond. The other slaves mentioned are the children of Prudence, born since Arnold took possession. On the 1st of January, 1855, Arnold, as guardian of Lydia Ann, hired said slaves to Nunnally, one of the defendants, for one year, for their victuals and clothes.

"On the 15th of May, 1855, the plaintiff married the said Lydia Ann, and on the 29th of August following she died. The slaves sued for were in the possession of the defendants before and at the time of the commencement of the suit, and while so in possession of the defendants, and before the commencement of the suit, were demanded by the plaintiff of defendants, and they refused to give them up."

Upon the above statement of facts, the court found for the plaintiff; whereupon defendants filed their motion for a new trial, on the ground that the finding of the court was not warranted by the facts, which motion was overruled, and defendants appealed to this court.

The question arising, in this case, upon the foregoing facts is: "What interest in the slaves did the plaintiff acquire by virtue of his marriage?" Was the interest of Lydia Ann, at the time of her marriage, property in possession, or was it a mere chose in action? If the former, then the marriage operated as a gift to the husband and the title vested in him; if the latter, then the husband only acquired by the marriage the right to reduce such chose in action into possession during the coverture. Upon the determination of these questions depends the right of the plaintiff to recover in this action.

The elementary law-writers define a chose in action to be a thing of which one has not the possession or actual enjoyment, but only a right to it, or a right to demand it by action at law: 2 Bla. Com. 396, 397. Kent defines it to be a personal right

not reduced to possession, but recoverable by suit at law. Thus it is said money due on a bond, note, or other contract, is a chose in action, for a property in the money vests whenever it becomes payable; but there is no possession till recovery by course of law, unless payment be voluntarily made. So damages for breach of covenant for detention of chattels, or for torts, come under the title of choses in action. If these are not reduced into possession by the husband during the coverture, it is clear he acquires no right to them.

In the case under consideration, we are of opinion that the right of Lydia Ann in the slaves was a chose in possession, and not a chose in action. The estate of Swearingen had been fully administered, and the slaves in controversy allotted to Lydia Ann by commissioners duly appointed for that purpose. Her distributive share had, moreover, passed into the hands of her guardian, and it is well settled that the possession of the guardian is the possession of the ward. He acts in a mere fiduciary capacity, and is the agent and representative of his ward in all matters relating to the trust property. Nor does the fact that he had hired the slaves for a year to Donnelly affect the question in any wise, for Donnelly was a mere bailee, and the possession of the bailee is the possession of the bailor. There was no adverse claim on the part of Donnelly. He had no property in the slaves, but a mere right to enjoy the use of them for a limited period. It was a right perfectly consistent with the claim and property of the ward. If we are right in these views, then the possession of Donnelly, in contemplation of law, was the possession of Arnold, the guardian, and the possession of the guardian was the possession of Lydia Ann, his ward; and upon the marriage of Lydia Ann, her possession was transferred to her husband, the plaintiff in this suit.

In this view of the law we are amply sustained by authority. The case of *Magee v. Toland*, 8 Port. 38, is directly in point, and in every feature identical with this. The controversy related to a slave, the property of one Jane Carnathan, a minor, which was in possession of her guardian, George Hays. On the 1st of January, 1835, Hays hired the slave to Magee for one year, and the slave was delivered to him. On the 11th of June, 1835, Jane intermarried with the plaintiff Toland, and in August following she died. Neither Jane nor her husband ever had the actual possession of the slave. Upon this state of facts, the court held that the possession of Magee, the bailee, was the possession of Hays, the guardian, and the possession

of Hays was the possession of his ward, Jane, and upon the marriage of Jane her possession passed, *eo instanti*, to her husband, and the property vested absolutely in him. The same doctrine is recognized in *Chambers v. Perry*, 17 Ala. 726; *Sausey v. Gardner*, 1 Hill (S. C.), 191; *Harrison v. Farmers' and M. Bank*, 3 Litt. 275; *Wilcox v. Calloway*, 1 Wash. (Va.) 39; *Davis v. Rhame*, 1 McCord Eq. 195; *Armstrong v. Simonton*, 2 Murph. 351; *Morrow v. Whiteside*, 10 B. Mon. 411. In *Sausey v. Gardner*, 1 Hill (S. C.), 191, the court held that where a slave was allotted to the wife in part of her share of the estate, but left in the care of the executor, the marital rights of the husband attached, although he never had actual possession.

Such a concurrence of authority from states in which the institution of slavery exists, and in which cases of this kind so frequently occur, leaves but little doubt as to the correctness of the rule.

The other judges concurring, the judgment of the court below will be affirmed.

WIFE'S CHOSES IN ACTION become husband's property, upon his reducing them into possession: *Leahy v. Maupin*, 47 Am. Dec. 120, and note 125; *Pierces v. Smith*, 75 Id. 486.

GUARDIAN CANNOT HOLD ADVERSELY TO WARD: *Weeks v. Weeks*, 47 Am. Dec. 358.

GUARDIAN'S CONTROL OVER PERSON and property of his ward: See *Palmer v. Oakley*, 47 Am. Dec. 41; and as to guardian's power to lease such property, see note 73.

POSSESSION OF BAILER, when possession of bailor: See *Chase v. Washburn*, 69 Am. Dec. 623; also *Weeks v. Weeks*, 47 Id. 358; *Philips v. Harries*, 19 Id. 166.

THE PRINCIPAL CASE IS CITED to the point that prior to the act of 1875, the wife's choses in possession at the time of her marriage vested absolutely in the husband, in *Roberts v. Walker*, 82 Mo. 206; and became subject to his debts: *Alexander v. Lydick*, 80 Id. 345. In *Coughlin v. Ryan, Adm'r*, 43 Id. 168, it is cited to the *dicta* therein contained that the husband's right to the wife's choses in action terminates by her death.

CHATTEL IN POSSESSION of the trustee of a woman, is not a chose in action, but a chose in possession, and on her marriage will pass to her husband: *Müller v. Bingham*, 36 Am. Dec. 58, and note 60.

STEWART v. GRIFFITH.

[38 MISSOURI, 12.]

ACT OF LEGISLATURE AUTHORIZING GUARDIAN TO SELL the lands of his wards, and to apply the proceeds thereof to their maintenance and support, under order of court, is not unconstitutional as encroaching upon the prerogative of the judicial department of the government.

ERROR to the circuit court of Marion County. The opinion states the case.

Rush, Anderson, and Glover and Shepley, for the plaintiffs in error.

Lipscomb, for the defendants in error.

By Court, BATES, J. By an act of the general assembly, passed on the seventeenth day of November, 1855, it was enacted as follows:—

“Sec. 1. Daniel A. Stewart, guardian of the persons and curator of the estate of James M. Johnson, Mary E. Johnson, and Emily F. Johnson, minor heirs of William Johnson, deceased, is hereby authorized and empowered to sell all the real estate belonging to said minors in Marion County, in the state of Missouri, subject to the approval of the county court of said county of Marion.

“Sec. 2. The county court of Marion County is hereby authorized and required to make an order for the sale of the west half southeast quarter of section 21, and the west half northeast quarter, and the northeast fourth of the northeast quarter of section 29, all in township 57 of range 7 west, with the appurtenances thereunto belonging, and prescribed the mode of appraising and selling the said real estate.

“Sec. 3. Said real estate shall not be sold for less than three fourths of its appraised value, or the amount at which the same shall have been appraised.

“Sec. 4. Upon the payment of the purchase-money for said real estate, the said Daniel A. Stewart is hereby authorized to make a deed to the purchaser or purchasers thereof, to be acknowledged before the said county court of Marion County, conveying all the right of said minors in and to said real estate to the purchaser or purchasers thereof.

“Sec. 5. Said Stewart shall make a full report of his proceedings as to the appraisement and sale of said real estate to said county court, and if the same be approved by said court, an order shall be made by said court accordingly; and if such

proceedings be not approved by said court, the same shall be null and void; and the court shall, upon the application of said Stewart, make another order for the sale of said real estate, containing the same requirements as hereinbefore specified.

"Sec. 6. The money arising from the sale of said real estate, or so much thereof as may be necessary, shall be applied, under the direction of said county court of Marion County, to the support, maintenance, and education of said minors; provided, however, that said money shall be loaned out at legal interest, and shall be used for the purposes aforesaid only, in such sums as may, from time to time, be required": See Private and Local Acts of Missouri, Adj. Sess. 1855, p. 395.

Stewart, acting in pursuance of that law, and under the order of the county court of Marion County, sold the land mentioned in the second section to the defendants, who paid a portion of the price bid, and gave notes for the remainder; and this suit is brought for the recovery of the amount of the notes.

The defendants say that the notes are without consideration, because Stewart had no power or authority to sell said land.

The court below sustained that defense, and gave judgment against the plaintiff, who appealed to this court.

The only question presented for our consideration is as to the power of the legislature to authorize Stewart to sell the land of his wards.

It is insisted by the defendants that the power exercised by the general assembly in passing the act quoted is of a judicial character, and therefore void, because it is in conflict with the constitution of the state. The question presented is of very great interest: firstly, because of the important principles involved in its consideration; and secondly, because of the number of estates which have been transferred under similar laws passed by the general assembly.

Whilst it is the duty of the judiciary to construe statutes, and if they be found to be in violation of the constitution, to declare them void, yet thus to annul an act of a co-ordinate branch of the government is the exercise of a very high power, which must be used with great care and circumspection, and only in a plain case.

The laws of Missouri are, first, the constitution, treaties,

and laws of the United States; and second, the constitution and statutes of the state of Missouri, including the common law of England, and the acts of the British Parliament made prior to the fourth year of the reign of James the First, which are adopted by a statute as laws of the state. These constitute the body of the laws of Missouri, and we know no "higher law,"—no paramount *leges legum*. We have no competency to know or decide upon "natural right," or the principles of "eternal justice."

The second article of the constitution of Missouri is as follows:—

"The powers of government shall be divided into three distinct departments, each of which shall be confided to a separate magistracy; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The first section of the third article declares that "the legislative power shall be vested in a general assembly."

The first section of the fifth article declares that "the judiciary power as to matters of law and equity shall be vested in a supreme court," etc., and this language is repeated in the amendments adopted in 1822.

The government organized by the constitution has all the powers of the state, and may exercise them in all cases not prohibited by the constitution; and in considering the powers of the legislative departments, we begin with a very different rule from that which obtains when we are considering the constitutional validity of an act of the Congress of the United States, because it is expressly declared in the constitution of the United States that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," and we therefore look to the constitution of the United States to find the authority for every act of Congress. But all the legislative power which the people of the state have is vested in the general assembly, with the exception of such power as is by the constitution itself prohibited. If this act of the general assembly be an exercise of legislative power, it is valid unless it is forbidden by the constitution itself, and it is not perceived that anything in the constitution forbids it.

The fact that the supposed owners of the land which was

ordered to be sold were infants, does not, in our opinion, affect the constitutional question. Under the constitution, every citizen is the equal in rights and responsibilities of every other citizen, whether we regard an adult sane man, not convicted of crime, or a new-born infant, a married woman, a lunatic, or a convicted felon; yet, for just reasons, the legislature has declared that certain classes of citizens are under disability to perform some acts which citizens generally are competent to perform, and has exercised peculiar authority over their persons and estates. The legal propriety of such acts when general, uniform, and prospective, is not disputed. Nor does it affect the question that the property authorized to be sold was land. The constitution makes no distinction between real and personal property.

It would be competent for the legislature, by a general act, to direct the sale of all the land or all the property of infants.

The question, however, yet remains: Is it within the power of the legislature to empower one named man to sell specific property of another man? This is the bare question. The fact that the man whose property is to be sold is himself under a disability to sell, which disability is created or made efficient by law, confers no power upon the general assembly. That this might be effected by a general, uniform, prospective law not being doubted, there remains only the objection that it is an exercise of judicial and not legislative power, because of its special application to a particular case only.

In this act, the general assembly decides or assumes that Daniel A. Stewart is the guardian of the persons and curator of the estate of James M. Johnson, Mary E. Johnson, and Emily F. Johnson; that they are minors; that they are heirs of William Johnson, deceased, and that they own certain described land. Are the matters so decided or assumed definitely settled, or may they be disputed? Can the supposed minors deny that they are minors? Can they deny that Daniel A. Stewart is their guardian or curator of their estate, and if they do so successfully, can they reclaim the land sold? Is the trust and power reposed in Stewart personal, to be exercised by him alone, or can any person holding his offices of guardian and curator exercise it; and must it be exercised during the minority of all the infants, or can it be exercised after some or all of them have attained majority?

These and many other interesting questions present themselves as we consider the act, but the study of these questions

does not much assist us in determining the main question, whether the general assembly exercised judicial power in passing this act.

It is very difficult, if not impossible, to give comprehensive definitions of "legislative power" and "judicial power" so as to enable a judge to determine with certainty, in all cases, to which power a performed act belongs.

In the case of *Watkins v. Holman*, 16 Pet. 25, the supreme court of the United States said: "It is difficult to draw a line that will show with precision the limitation of powers under our form of government. The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, a judicial power. And so, a court in the use of a discretion essential to its existence by the adoption of rules or otherwise, may be said to legislate. A legislature, too, in providing for the payment of a claim, exercises a power in its nature judicial." Yet we suppose that none of these acts referred to by the supreme court of the United States, violate the article of the constitution which makes a division of the powers of government. Though of the nature of acts appropriate to another department, they are essentially necessary to the proper performance of the duties of the department performing them.

In the case of *State v. Fry*, 4 Mo. 120, this court held that a divorce granted by the legislature was invalid, and judges McGirk and Tompkins (in addition to other reasons) both expressed the opinion that the granting a divorce was the exercise of judicial power, and the principal argument used by them to show that it was not a law was that it expended its force upon the parties divorced, and was not a rule of conduct, permanent, uniform, and universal.

We cannot, however, agree that all laws must be universal, and apply uniformly to all citizens. Laws may, and often do, properly apply only to certain classes of citizens, to the exclusion of others; and if any less than the whole number of citizens may be comprehended in a law, no reason is perceived why a law may not comprehend only a certain number, whether mentioned by general terms of description, or by name, or other special description. Nor is any reason perceived why a law should necessarily apply to all property of like character within the state. A law may be such, which applies only to a certain kind of property, or even to a specific piece of property. It may be a rule of conduct as to that prop-

erty only, and efficient as a law, if it violated no provision of the superior law.

The act under consideration, we think, cannot be regarded as other than a law. It is true that it decides or assumes the existence of certain facts, but that is also true of almost all laws.

It has not the character of a judicial act. It is not the adjudication of what the law is, but is a declaration of what the law shall be. It is not the administration of justice according to existing law, nor the determination of a controversy. It is not a violation of the constitution. The law is valid, and the sale of the land, if conducted in accordance with its requirements (which is not disputed), passes the title of the infants.

It would extend this opinion too much to decide and comment upon many of the cases which we have examined. We refer to the cases cited below, as sustaining in part, and more or less pointedly, our views: *Rice v. Parkman*, 16 Mass. 326; *Davidson v. Johannot*, 7 Met. 388; *Sohier v. Massachusetts General Hospital*, 3 Cush. 483; *Dorr's Case*, 3 R. I. 299; *Taylor v. Place*, 4 Id. 324; *Cochran v. Van Surlay*, 20 Wend. 365 [32 Am. Dec. 570]; *Leggett v. Hunter*, 19 N. Y. 445; *Carter v. Commonwealth*, 1 Grant Cas. 216; *Fullerton v. McArthur*, Id. 232; *Kneass's Appeal*, 31 Pa. St. 87; *Shoenberger v. School Directors*, 32 Id. 84; *Doe v. Douglass*, 8 Blackf. 10; *Kibby v. Chitwood*, 4 T. B. Mon. 91 [16 Am. Dec. 143]; *Shehan v. Barnett*, 6 Id. 593; *Pearce v. Patton*, 7 B. Mon. 162 [45 Am. Dec. 61]; *Holman v. Bank of Norfolk*, 12 Ala. 369; *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Bowers*, 30 Id. 246 [64 Am. Dec. 159]; *People v. Coleman*, 4 Cal. 46 [60 Am. Dec. 581]; *Wilkinson v. Leland*, 2 Pet. 627; *Watkins v. Holman*, 16 Id. 60; *State v. Fry*, 4 Mo. 120; *Bryson v. Bryson*, 7 Id. 590; *Hamilton v. St. Louis Co. Court*, 15 Id. 4; *Cunningham v. Gray*, 20 Id. 170.

In New Hampshire, the justices of the superior court of judicature advised the house of representatives of the general court that an act of the legislature to authorize the sale of the land of a particular minor cannot be easily reconciled with the spirit of the article in the constitution separating the powers of government: 4 N. H. 572.

In Illinois, *Lane v. Dorman*, 3 Scam. 238 [36 Am. Dec. 543], it was held that a special law authorizing a sale of land of a deceased person, to pay specified debts, was unconstitutional, as an exercise of judicial power.

The case of *Dubois v. McLean*, 4 McLean, 486, was decided by the circuit court for the United States for Illinois, in submission to the authority of the case of *Lane v. Dorman*, *supra*.

We refer also, generally, to Sedgwick on Statutory and Constitutional Law, c. 5, p. 142, etc., and to Smith on Statutory and Constitutional Law, c. 7, and part of c. 9, beginning on p. 500; and to the opinion of Judge Hickey, in the case of Sidney Bedford, in the circuit court of Fayette County, Kentucky, in the tenth volume of the American Jurist, p. 297; and also to a criticism of the case of *Watkins v. Holman*, 16 Pet. 25, supposed to have been written by Hon. Archibald Williams, late of Quincy, Illinois, and published in the Western Law Journal of May, 1847 (vol. 4, p. 337).

The view which we have taken of the subject is expressly based upon the idea that the act in question directs only the management of the property of the infants, changing its form and directing its use for their own benefit. Had the act undertaken to appropriate their property to the use of any other person, it would have been void, because "retrospective in its operation," by destroying rights previously vested by law.

In like manner an act which should undertake to annul or alter a settlement or disposition of property lawfully made by deed, last will, or other means, would be void. The property acted on in this case is understood to have been absolutely the property of the infants, subject to their free use and disposal under the limitations and provisions of the general law. Had the land been devised to them with a provision in the devise limiting their power to dispose of it before they should attain the age of twenty-one years, we are of opinion that no power in the state could authorize them, or any other person for them, to dispose of it before that time; because by so doing, the lawful act of the deviser in thus limiting his devise would be annulled by an act "retrospective in its operation." But as this case stood, no past act and no right of any person other than the infants was affected, and the right of the infants to the land was subject to a known power in the state to cause the sale of the land, manifested by existing laws, the provisions of which were at all times liable to repeal or modification, and the act in question was only a modification of the general laws in respect to the management of the estates of infants.

Whilst we maintain the validity of this law, we think that we violate no rule of propriety or courtesy in expressing a

decided opinion of the general impolicy of acts of like character.

Judgment reversed and cause remanded.

BAY, J., concurred.

DRYDEN, J., having been of counsel in the lower court, did not sit in the cause.

FOR CASES DISCOURAGING EXERCISE BY LEGISLATURE OF JUDICIAL POWERS, see *Lane v. Dorman*, 36 Am. Dec. 543; *Hawkins v. Governor*, 33 Id. 346; *Greenough v. Greenough*, 51 Id. 567; *Hunt v. Test*, 42 Id. 659; *Regent v. Williams*, 31 Id. 72; *De Chastellus v. Fairchild*, 53 Id. 570; *Wright v. Wright's Lessee*, 56 Id. 723; *Sharpless etc. v. Mayor of Philadelphia*, 59 Id. 759; *Menges v. Dentler*, 75 Id. 616, and notes to these cases.

THE PRINCIPAL CASE IS CITED in *Thomas v. Pullis*, 56 Mo. 211, where it is decided that the legislature has power to authorize a guardian or administrator, or any one else named in the act, to pass the title of an infant, or to compromise an unsettled claim upon such terms as the parties may agree upon; and in *Cargile v. Fernald*, 63 Id. 304, where the court say that prior to the constitution of 1865, where, during the lifetime of decedent, judgment had been obtained, and execution had issued under foreclosure of mortgage on his lands, the legislature had power to pass an act authorizing his administrator to sell the lands for the purpose of satisfying the debt. It is cited in *Dickens v. Carr*, 84 Id. 658, where the court decide that an act of the legislature declaring a minor to be of full age, for the purpose of contracting and being contracted with, is not unconstitutional.

YOUNG v. CLEVELAND.

[33 MISSOURI, 126.]

JUDGMENT IS NOT SATISFIED BY LEVY OR EXECUTION upon property of the defendant, if the same is afterwards restored to his possession.

SURETY IS NOT DISCHARGED BY ACT OF CREDITOR IN PARTING WITH SECURITY of the principal debtor, where he does so for the purpose of securing other property of greater value, which would be otherwise unavailable.

THE opinion states the facts.

Beal, for the appellant.

By Court, DRYDEN, J. This is a suit brought before a justice of the peace by Young, against George W. Cleveland, on a note made by the defendant, William Cleveland and Dudley Horn, for \$205.37½, payable to the plaintiff's testator, on which several partial payments had been made, reducing the demand to a sum within the jurisdiction of a justice of the peace. The case was tried before the justice, and taken to the circuit court, where, upon a trial anew, after the plaintiff had read the note, the defendant proved that he and Horn were merely

the securities of William Cleveland; that after the note became due, William Cleveland, the principal debtor, confessed a judgment before a justice of the peace, in favor of the plaintiff, for the balance due on the note; that the plaintiff took execution and caused it to be levied on personal property of said William of the value of about ninety dollars; that before the sale of it under the execution, an agreement was made between the parties whereby the said William gave to the plaintiff an order for his (said William's) wife's interest in the estate of her father of the value of one hundred dollars, in lieu of the property levied on, and the plaintiff thereupon caused the levy to be discharged and the property to be restored to said William.

The circuit court held that the defendant was entitled, in his defense, to the benefit as well of the value of the property levied and restored (ninety dollars) as to the proceeds of the order (one hundred dollars); and the two sums exceeding in amount the unpaid balance on the note, found a verdict for the defendant. Upon what principle the value of the property levied on is, under the circumstances of the case, made to discharge any part of the debt, is not easy to see. If it be said a levy on personal property is a satisfaction of the judgment, it is replied, it is so only conditionally; that where the property is restored to the possession of the defendant, it is not a satisfaction in law of the judgment: *Walker v. McDowell*, 4 Smedes & M. 135 [43 Am. Dec. 476]; *Banks v. Evans*, 10 Id. 35 [48 Am. Dec. 734]; *Marshall v. Morris*, 13 Ga. 187.

[Here the property was returned to the owner.]

Nor is there any ground of defense in the assumption that the plaintiff, the creditor, has parted with a security from the principal debtor to the prejudice of the defendant, a surety: 1 Story's Eq. Jur. 322, for the reason that the security was surrendered in lieu of property of greater value, which could not have been reached by legal process, and which was thus applied in extinguishment of the debt *pro tanto*. The discharge of the levy was beneficial—not injurious—to the defendant. The circuit court committed error in its declaration of the law, and for this cause its judgment is reversed and the cause remanded for a new trial; the other judges concurring.

LEVY OF EXECUTION UPON PROPERTY WHICH IS AFTERWARDS RETURNED to the custody of the defendant, is not a satisfaction of the judgment: *Parker v. Jones*, 75 Ad. Dec. 441, and cases in notes.

SURETY, WHEN DISCHARGED BY ACT OF CREDITOR, in releasing securities of principal debtor: See *Springer v. Toothaker*, 69 Am. Dec. 66; *Harris v. Taylor*, 67 Id. 576; *New Hampshire Bank v. Colcord*, 41 Id. 685, and cases in notes.

THE PRINCIPAL CASE IS CITED IN *State v. Str.*, 80 Mo. 63, to the point that "there can be no question that when sufficient personal property of the defendant in an execution to pay it is levied upon it operates as a satisfaction if nothing more appears, and so long as said property may be held under the levy undisposed of, no second execution can be issued"; and in *City of Warrensburg v. Simpson*, 22 Mo. App. 699, to the same point. The principal case is cited in *Lindley v. Kelley*, 42 Ind. 294, among a large number of others, where it is said that in Indiana a levy upon real estate of sufficient value to pay the judgment creates a presumption of satisfaction, and there exists no distinction between the effect of a levy upon real estate and that of a levy upon personalty. The presumption of satisfaction does not arise from a mere levy, but from proof that the property levied upon is sufficient to satisfy the execution.

TOTTEN v. COLE.

[33 MISSOURI, 128.]

LIABILITY FOR INJURY TO TRESPASSING ANIMALS.—A person upon whose land an animal strays may turn it off, using the usual and ordinary caution to avoid doing any injury to it; but is liable to the owner of the animal for any injury which results to it from a failure to exercise such caution.

THE opinion states the case.

Beal, for the respondent.

Green, for the appellant.

By Court, BATES, J. The petition in this case is as follows: "The plaintiff states that on or about the thirtieth day of June, 1857, defendant failed to keep his fences and inclosure around his oats of sufficient height, as required by law, in consequence of which a mare of plaintiff, and of the value of one hundred and twenty-five dollars, went into the said inclosures of defendant; the defendant then and there killed said mare wrongfully and without any excuse. Plaintiff charges that the inclosures of the defendant were not constructed and built sufficient and according to law, and that in consequence of the insufficiency of the fences around his inclosures, about the thirtieth day of June, 1857, at Jefferson County, Missouri, the property of plaintiff, to wit, a certain gray mare, of the value of one hundred and twenty-five dollars, was killed, and rendered of no value to plaintiff, by means and in consequence of which the plaintiff is damaged one hundred and twenty-five dollars, for which he asks judgment."

The defendant's answer denies all the material allegations of the petition. The evidence tended to show that the defendant's fence was not such as the statute regulating inclosures requires; that a mare of the plaintiff was found in the defendant's field, and was chased out by a servant of defendant, and was killed by running against a snag or stump after she had passed out of the field.

The court instructed the jury as follows:—

1. If the jury find that the field of the defendant was not in all places of the height of five feet, staked, and ridered, or locked at the corners, and that the plaintiff's mare having jumped over it, the defendant's servants or employees, whilst engaged in turning the mare out, they set dogs on the mare, and that in consequence of any incautious chasing the mare was killed, they will find for the plaintiff the value of the mare, and any further damages he may have sustained thereby.

2. But if the jury find that the mare was killed by an accident in no way caused by the dogging of her by the defendant's dogs, they will find for the defendant.

3. It makes no difference in the question submitted to the jury whether the mare was killed in the field or in the lane, if the accident was caused by the chasing by dogs.

4. That although they may find that the fence around the defendant's field was not of the height required by law, yet if the horse of the plaintiff strayed into it, the defendant had a right to turn it out, using the usual and ordinary caution to avoid doing any injury to the animal; and the amount of caution required by the law in such cases is always proportioned to the danger resulting from the use of the means employed.

5. That the setting of dogs on horses, to run them out of the field of another, is not necessarily a wrongful act, if done under circumstances indicating the observance of the care and caution to prevent injury to such animal proportioned to the danger resulting from the use of the means employed.

6. To entitle the plaintiff to their verdict, the jury must find: 1. That the killing of his horse was the result of the chasing by dogs; and 2. That the chasing with the dogs was attended with circumstances indicating the want of the care and caution necessary to avoid doing injury to the animal proportioned to the danger resulting from the acts done.

Although these instructions are somewhat vague in describing the amount of care to be used by the defendant, yet, upon the whole, they make a fair statement of the law applicable to

the case. The defendant asked six instructions, which were refused, but the substance of them is included in the instructions given. Verdict for forty dollars having been given for the plaintiff, and judgment entered upon it, we will not interfere with it.

Judgment affirmed.

BAY and DRYDEN, JJ., concurred.

OWNER OF ANIMAL WHICH HE SUFFERS TO RUN AT LARGE runs risk of only accidental injury to it, and can recover for any injury which it suffers through the negligence of another: *Murray v. South Carolina R. R. Co.*, 70 Am. Dec. 219. A trespassing beast may be expelled or removed by force, but may not be destroyed or subjected to permanent injury or unnecessary force: *Johnson v. Patterson*, 35 Id. 96. Wanton, willful injury done to a man or beast while trespassing cannot be justified: *Loomis v. Terry*, 31 Id. 306, and notes.

HARRISON v. TAYLOR.

[33 MISSOURI, 211.]

WHEN TENANT IN COMMON BRINGS EJECTMENT against his co-tenant, who sets up an adverse holding "against all persons," it is unnecessary for the plaintiff to show a previous demand for possession.

EJECTMENT. The opinion states the point.

Cates and Page, for the appellant.

Glover and Shepley, and Hill, for the respondent.

By Court, BATES, J. This case is very much like the case of *Tayon v. Ladeo*, 33 Mo. 205, in which our opinion is given at this term, which covers nearly all the questions necessary to be decided in this case.

In that case, the plaintiffs claimed solely a confirmation by the act of 1812, without survey. In this case, the plaintiff claimed a confirmation by the act of 1812, and also a confirmation by the act of 1816, and survey thereunder.

It was urged by the appellant in this case that the defendants, or one of them, was tenant in common with the plaintiff, and therefore that the plaintiff could not sue without having made a previous demand for possession.

The answer states that the defendants held the premises "adversely against all persons." Their adverse holding thus appearing, it was unnecessary for the plaintiff to show a demand of possession.

The other judges concurring, judgment affirmed.

THE PRINCIPAL CASE IS CITED in *La Riviere v. La Riviere*, 77 Mo. 512, to the point that in an action of ejectment by one tenant in common against another the ouster is admitted by a general denial.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *Carpentier v. Mendenhall*, 23 Cal. 488, where its doctrine was recognized, but declared to have no application to the case at bar.

BOOGE v. PACIFIC RAILROAD.

[38 MISSOURI, 212.]

BREACH OF CONTRACT FOR HIRE—FORMER RECOVERY.—Where a servant who has been wrongfully dismissed sues and recovers before the expiration of the term for which he was hired, such recovery can only be regarded as damages for the breach of the contract, and is a bar to any further recovery thereunder.

THE opinion states the case.

Moody, for the appellant.

Whittelsey, for the respondent.

By Court, BAY, J. This is a suit upon a contract for hire. The petition states that on the 15th of March, 1858, the defendant employed the plaintiff as a runner, or solicitor, for freight and passengers from that time until the close of navigation on the Missouri River, at the price of \$125 per month, payable monthly; that on that day plaintiff entered upon such service, and continued to serve defendant in that capacity until the 19th of June following, when defendant, without cause, discharged him, and refused to permit him to perform said contract, which he was at all times willing and ready to do, and offered to do. The petition further states that the navigation on the Missouri River did not close until December, 1858, and that there is due and owing him \$375 for his wages under said contract for the months of September, October, and November.

The answer of defendant admits the employment, and at the price stated, but denies that it was for any stipulated period of time, but only for such time as defendant might require his services; and that defendant had fully paid him for his services up to the time of his discharge.

Defendant sets up as a further defense a former recovery for a breach of the same contract.

The cause was tried by the court sitting as a jury, and upon the trial evidence was introduced tending to prove the con-

tract, as stated in the petition, and that navigation on the Missouri River did not close until after the 1st of December, 1858.

The defendant read in evidence the record and proceedings in a former suit between the same parties and in the same court, instituted on the 22d of September, 1858, for a breach of this identical contract, and in which plaintiff obtained judgment for the sum of \$250, which defendant afterwards paid. The petition in this suit is almost a literal copy of the petition in that, with this exception, that in the first suit plaintiff claims as damages the wages due him for the time intervening between the 1st of July and the 1st of September, 1858, while in this he seeks to recover for the months of September, October, and November.

The plaintiff asked the following instruction, which was refused:—

“If the defendant employed the plaintiff in March, 1858, to serve it at \$125 per month, payable monthly, from that date until the close of navigation on the Missouri River, and plaintiff served according to his contract up to June 19, 1858, when defendant discharged him; and if such navigation did not close until after December 1, 1858, and plaintiff was willing and ready, and offered to serve defendant as aforesaid up to December 1, 1858, then said plaintiff has a right to recover his said pay for the whole time up to December 1, 1858, and the fact that he has before sued defendant, and recovered \$250 for his wages for the months of July and August, 1858, is no bar to this action.”

The court thereupon declared that upon the facts the plaintiff was not entitled to recover.

In due time the plaintiff filed his motion for a new trial, which being overruled, he appeals to this court.

The only question for our consideration is whether the recovery in the first suit is a bar to the present action.

It is contended by the appellant that inasmuch as the contract calls for monthly payments, he has a right to institute suit for his wages at the end of each and every month, and that a recovery for one month's services is no bar to a suit for services for a subsequent month.

As an abstract proposition, this is undoubtedly true, but it is not perceived how it can be made applicable to a case of this kind; for this is not a suit for work and labor or services performed, but for the breach of a contract, which breach

consists in wrongfully dismissing the plaintiff before the termination of the period for which he was employed, thereby preventing him from performing his part of the contract. A servant or agent wrongfully dismissed may immediately bring his action for a breach of the contract in dismissing him; or he may wait till the end of the term for which he was hired, and then sue for his entire wages, and in many cases it has been contended that he may treat the contract as rescinded, and sue on a *quantum meruit* for the work actually performed: *Cutter v. Powell*, 2 Smith's Lead. Cas. 36. But he must make his election, and if he elects to sue for the breach before the termination of the period for which he was hired, and recovers, such recovery will be a bar to any subsequent action upon the same contract. In the case at bar, the plaintiff elected to sue for a breach of the contract, and brought his action on the 22d of September, 1858, and recovered the sum of \$250; and although this was claimed as wages due him from July 1st to September 1st, still it can only be regarded as damages for the breach of the contract in wrongfully discharging him: Smith on Master and Servant, 97; 1 Parsons on Contracts, 527, note v; for it is admitted and averred in the petition that he performed no service for the defendant after the nineteenth day of June, the day he was discharged, and he had been fully paid up to that time. It was only upon the assumption that the contract had been violated on the part of the defendant that enabled him to recover at all for mere constructive service.

In this view of the case, the recovery in the first suit is a bar to the present action, and the court properly refused the instruction asked by the plaintiff.

The judgment will be affirmed.

RIGHTS AND REMEDIES OF SERVANT who has been wrongfully discharged before the expiration of the time for which he was hired, are discussed and clearly set forth in the note to *Decamp v. Hewitt*, 43 Am. Dec. 205-214, where the principal case is cited and commented upon; see also *Hunt v. Crane*, 69 Id. 381; and *Ream v. Watkins*, 72 Id. 283, and notes.

THE PRINCIPAL CASE IS CITED, and its doctrine discussed, in *Souris v. Salorgne*, 14 Mo. App. 486, where it is decided that a recovery by a servant for a breach of a contract of hiring, in an action brought before the termination of the period for which he was hired, is a bar to a subsequent action for a breach of the same contract; that in an action so brought, after a wrongful discharge of the servant, the recovery is for damages, and not for wages for constructive service; and that a servant cannot, after his discharge, treat the contract as still subsisting, remain in voluntary idleness, and recover for constructive service.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

STATE v. WILSON.

[48 NEW HAMPSHIRE, 415.]

LAW DOES NOT FAVOR REPEALS BY IMPLICATION.

OLDER STATUTE IS NOT REPEALED BY LATER ONE, if, by reasonable construction, both may stand together; and the same principle applies to a repeal of the common law.

COMMON LAW IS REPEALED BY IMPLICATION, when the whole subject is revised by a statute apparently intended to prescribe the only rules applicable thereto.

COMMON LAW RELATIVE TO NUISANCES IS NOT REPEALED by an act imposing a penalty for occupying a building as a slaughter-house, without license, in the compact part of a town.

INDICTMENT for nuisance at common law, for maintaining a slaughter-house in an improper manner. The defendant moved to quash the indictment, on the ground that the common-law remedy was repealed by statute. The motion was overruled, and a verdict of guilty being returned, the defendant moved for an arrest of judgment, for reasons appearing upon the case.

Minot and Mugridge, for the respondent.

Fowler, solicitor, for the state.

By Court, **BELL, C. J.** This is a motion in arrest of judgment, on the ground that the proceeding by indictment at common law is taken away by our statute: R. S., c. 119.

The motion to quash the indictment was addressed to the discretion of the court, and such a motion may always be properly refused in cases of doubt: Wharton's Crim. Law, 240; 2 Chitty's Crim. Law, 299; Archbold's Crim. Pl. 85; 2 Hawk.

P. C., c. 25, sec. 146. No exception appears to have been taken on this point.

If the proceeding by indictment is taken away by the revised statutes, it is by implication only. But the law does not favor a repeal by implication: 1 Bac. Abr., tit. Statute, D; *Bowen v. Lease*, 5 Hill, 226. It has ever been confined to repealing as little as possible of the preceding statute. Although two acts are seemingly repugnant, yet they shall, if possible, have such construction that the latter may not be a repeal of the former by implication: Bac. Abr., tit. Statute, D; *Foster's Case*, 11 Coke, 63; *Weston's Case*, Dyer, 847; *Snell v. Bridgewater etc. Co.*, 24 Pick. 298. And the same principle applies to the implied repeal of the common law: 1 Bla. Com. 88.

Two cases of such implied repeal are found: 1. Where the provisions of the later law are so inconsistent with and repugnant to the common law, or some earlier statute, that both cannot be in force. *Legis posteriores priores contrarias abrogant*, is a maxim of ancient date: *Porter's Case*, 1 Coke, 25, b; *Foster's Case*, 11 Id. 62; borrowed from the civil law: Digest 1, 3, 28, and n. 1, 4, 4; *Middleton v. Crofts*, 2 Atk. 674; 1 Bla. Com. 88; *Commonwealth v. Cooley*, 10 Pick. 39. But an older statute will not be repealed by a more recent one, unless the latter expressly negative the former, or unless the provisions of the two statutes are manifestly repugnant, in which case the earlier enactment will be impliedly modified or repealed: 9 Bla. Com. 89; 10 Vin. Abr. 525, tit. Statutes, E, 6, sec. 132; 2 Darras on Statutes, 638, 673; *Dakins v. Seaman*, 9 Mees. & W. 777. When both the acts are affirmative, and the substance such that both may stand together, the latter does not repeal the former, but they shall both have a concurrent operation: 1 Bla. Com. 90, and Sharswood, note 84; *Foster's Case*, 11 Coke, 62; *Robinson's Case*, 2 East P. C. 1110; Com. Dig., tit. Parliament, R, 9; *Williams v. Potter*, 2 Barb. 320; *McCartee v. Orphan Asylum*, 1 Cowp. 506 [18 Am. Dec. 516]; *Beals v. Hale*, 4 How. 37; *Morris v. Delaware & S. C. Co.*, 4 Watts & S. 461. The general rule of law and construction undoubtedly is, that where an act of Parliament does not create a duty or offense, but only adds a remedy to a duty or offense which existed before, it is to be construed as cumulative. This rule must, however, be applied with due attention to the language in each: Bac. Abr., tit. Statute, D; *Rex v. Jackson*, 1 Cowp. 297; *Middleton v. Crofts*, 2 Atk. 675.

Where there is a difference in the whole purview of two

statutes apparently relating to the same subject, the former is not repealed: *Bowen v. Lease*, 5 Hill, 225; *King v. Downs*, 3 Term Rep. 569; *Dwarris on Statutes*, 674; and in *Goldson v. Buck*, 15 East, 372, it was held that two acts relating to the same subject, confirming several powers to be exercised for different purposes, might well subsist together, and the former not be repealed by implication.

2. If the whole of a former law is revised by a new statute, and the latter appears to be intended to prescribe the only rules which should govern that subject, the particulars of the old law in which they differ will be regarded as repealed by implication: *Daviess v. Fairborn*, 3 How. 636; *Dexter v. Allen*, 16 Barb 18; *Commonwealth v. Cromley*, 1 Ashm. 179; *Goddard v. Boston*, 20 Pick. 410.

If a revising statute embrace all the provisions of antecedent laws on the same subject, and reduce them to one system, such statute virtually repeals the statutes revised, without any expression to that effect, and though there is no repugnancy between them: *Goodenow v. Buttrick*, 7 Mass. 140; *Bartlet v. King*, 12 Id. 537 [7 Am. Dec. 99]; *Ashley, Appellant, In re*, 4 Pick. 21; *Commonwealth v. Cooley*, 10 Id. 39; *Mason v. Waite*, 1 Id. 452; *Rogers v. Watrous*, 8 Tex. 62 [58 Am. Dec. 100]; *Illinois and M. Canal v. Chicago*, 14 Ill. 334; *Gorham v. Lockett*, 6 B. Mon. 146. And where some parts of a revised statute are omitted in the revision, they are not to be revised by construction, but are to be considered as annulled: *Ellis v. Paige*, 1 Pick. 43; *Rutland v. Mendon*, Id. 154; *Blackburn v. Walpole*, 9 Id. 97; *Towle v. Marrett*, 3 Me. 22 [14 Am. Dec. 206]; *Farr v. Brackett*, 30 Vt. 346; *Giddings v. Cox*, 31 Id. 609; *Leighton v. Walker*, 9 N. H. 59; *Wakefield v. Phelps*, 37 Id. 304.

And upon the same principle, if a statute revises the whole subject of an offense, for example, making that a qualified offense which was before absolute, or changing the time or mode of prosecution or the degree of punishment, it may be a repeal of the common law.

By the statute here in question (R. S., c. 119), the health officers may make regulations for the prevention and removal of nuisances, under a penalty, but it does not appear that any such regulations have been made in Pembroke, nor if any, what they are, and this provision may be dismissed. It may well be doubted, however, if such municipal regulations could have the effect to repeal the common law.

The health officers are authorized to remove nuisances at the expense of the owner or occupier of the building or inclosure in which they are found; but this is quite consistent with the continuance of the law inflicting punishment for the public wrong on those who are chargeable with nuisances.

A penalty is imposed on those who place or leave in or near any public street any substance liable to become offensive or injurious to the public health; but it is quite apparent that this is a new offense entirely different from that of nuisance.

The eighth section is the only one which seems to be in conflict with the common law as to nuisances, and here the conflict is only seeming.

"If any person shall use or occupy any building in the compact part of any town for a slaughter-house, for trying tallow, or for currying leather, or for the deposit of green pelts or skins, without permission of the health officers, he shall incur a penalty of ten dollars for each month in which the said building shall be so occupied."

A slaughter-house, and so of the other buildings required by this act to be licensed, is not, of course, a nuisance. They are all liable to become such by mismanagement or neglect; and it is doubtless for this reason that a license from the board of health is required, that they may be excluded from compact neighborhoods. Though not nuisances, they are liable to be, under the most careful management, at times offensive to those who reside upon or have occasion to be in the streets where they are situated. Those who keep slaughter-houses in the compact parts of towns without license, are made liable to the penalty imposed by the statute, equally, whether their buildings are or are not nuisances; and it would be no defense to a prosecution for the penalty, if the most complete proof could be produced that they were not nuisances.

It would be but a poor and inadequate redress for a nuisance such as a slaughter-house may become, that the health officers have the right to enter and remove any offensive matters that may be found in such a building at the expense of the owner.

The compact part of a town is a phrase of somewhat indefinite extent. A slaughter-house may be a nuisance, if ill-managed or neglected, though it may be in no sense in the compact part of a town. This statute can have no application to such a house. If prosecuted for the penalty, it would be a perfect defense that the building is not in the compact part of a town, and consequently, does not come within the provisions

of the law. It is not alleged, and consequently does not appear, that the building here in question is in the compact part of the town of Pembroke, and no presumption can be entertained to that effect. It is alleged it was near to a public street called Pembroke Street, in Pembroke, being a common highway, and near the dwelling-houses of divers good citizens of the state there situated, but this does not import that the place is in the compact part of the town, if there is any place in the town entitled to that designation.

The common law and this statute may well be in force together as to the same property. A party may have a license to occupy a building as a slaughter-house. This is no license to maintain a nuisance because the health officers are authorized to remove offensive matters from it at his expense, and if the building should be so managed as to become a nuisance, there is no reason why he may not be indicted and punished for the common-law offense.

It seems then clear, that this statute is a police regulation, in force and applicable to the compact parts of towns; that it does not cover the whole subject of nuisances, nor of slaughter-house nuisances, if, indeed, it covers any part of either; that the purview and purpose of the common law and of this statute are entirely distinct; that this statute does not necessarily or naturally prevent or interfere with the application of the common law, and is not inconsistent with it, and does not supersede it; and that the offense here charged is not embraced in or affected by the statute.

The motion in arrest must therefore be denied.

REFRAL BY IMPLICATION NOT FAVORED: *Bruce v. Schuyler*, 46 Am. Dec. 447; *Neill v. Koss*, 51 Id. 746; *Rogers v. Watrous*, 58 Id. 100; *Dugan v. Gittings*, 43 Id. 306; unless there is a strong and clear inconsistency between enactments: *Western Sav. Fund. Soc. v. Philadelphia*, 72 Id. 730; *Davis v. State*, 61 Id. 331; *Raeke v. Kennedy*, 58 Id. 239.

TWO AFFIRMATIVE STATUTES ON SAME SUBJECT MUST STAND, if possible, and neither be deemed to repeal the other: *Bruce v. Schuyler*, 46 Am. Dec. 447.

WHEN STATUTORY REMEDY IS TO BE DEEMED CUMULATIVE: *Dawson v. Miller*, 70 Am. Dec. 380, and note.

IF TWO STATUTES ON SAME SUBJECT CONFLICT, later one takes precedence: *Edgar v. Greer*, 74 Am. Dec. 316.

EMERSON v. SIMPSON.

[48 NEW HAMPSHIRE, 475.]

CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, and are construed strictly, because they tend to destroy estates.

WHEAT UPON CONDITION IN DEED that the grantee shall forever keep up and maintain a fence on the line between the land conveyed and other land specified, is not forfeited by neglect to keep up the fence after the grantee's death.

WRIT of entry to recover certain land. The land demanded was conveyed by demandants to one Simpson in 1849, the deed containing a condition that if the grantee should fail to keep up, at his own expense, forever, a good and lawful fence between the land granted and the grantor's land, then the deed was to be void. Simpson maintained such line fence until his death, in 1858, but his widow, the defendant, who continued to occupy the land, suffered the fence to go to decay, and neglected to repair it, though requested to do so. Whereupon demandants entered upon and took possession of the land, claiming a forfeiture of the fee on the ground that the condition of the grant had been broken.

Stickney, for the plaintiff.

Morrison, Stanley, and Clark, for the defendant.

By Court, BELL, C. J. If this was the case of a covenant, the liability of the defendant to maintain the fence in question might depend upon the fact, which is not shown in the case, whether there was or not a fence around the land conveyed, at the time of the conveyance, according to the distinction taken in *Spencer's Case*, 5 Coke, 16, where it was resolved that if the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be done upon the land afterward (for instance, to build a new wall on some part of the premises demised), the covenantor, his executors and administrators, would be bound, but not the assignee if he was not named, for the law would not annex a covenant to a thing which had no being; but if the lessee had covenanted for himself and his assigns, then for as much as it was to be done upon the land demised, it should bind the assignee; and the reason given is, that although the covenant did extend to a thing to be newly made, yet as it was to be made upon the thing demised, and the assignee was to take the benefit of it, therefore he should be bound by express words.

This distinction has been always adhered to: Platt on Covenants, 471; Taylor's Landlord and Tenant, 301; Williams's Landlord and Tenant, 290; *Lametti v. Anderson*, 6 Cow. 307; *Thompson v. Rose*, 8 Id. 266; *Allen v. Culver*, 3 Denio, 284; *Tallman v. Coffin*, 4 N. Y. 136; *Sampson v. Easterby*, 9 Barn. & Cress. 505; *Easterby v. Sampson*, 6 Bing. 644; *Doughty v. Bowman*, 11 Q. B. 444; *Congleton v. Pattison*, 10 East, 138; 1 Washburn on Real Property, 330.

Conditions subsequent are not favored in law, says Chancellor Kent (4 Kent's Com. 129), and are construed strictly, because they tend to destroy estates; and a vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. If then a condition be personal, as that the lessee shall not sell without leave, the executors of the lessee not being named, may sell without incurring a breach: *Anonymous*, Dyer, 65; *Anonymous*, Moore, 11.

It is a general rule (says the Touchstone, 183), that such conditions annexed to estates as go in defeasance and tend to the destruction of estates, being odious in the law, are taken (that is construed or expounded) strictly, and shall not be extended beyond their words, unless it be in some special cases; and therefore, if a lease be made on condition that if such a thing be not done, the lessor (without any words of heirs executors, etc.,) shall re-enter and avoid it, in this case regularly the heir, executor, etc., shall not take advantage of this condition. So if one make a lease for years of a house on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee that he shall depart, in this case if the lessor die, his heir, executor, etc., shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them, and hence it is that if a lease for years be made on condition that the lessee shall not alien without the license of the lessor, in this case the restraint shall continue only during the lives of the lessor and lessee, and no longer.

The same doctrine will be found in Litt. Ten., sec. 337; Willard on Real Estate, 106; Washburn on Real Property, 447; *Nicoll v. New York and E. R. R. Co.*, 12 N. Y. 131; 1 Smith's Lead. Cas. 99; *McQuesten v. Morgan*, 34 N. H. 400; *Chapin v. School District*, 35 Id. 445; *Ludlow v. New York and H. R. R. Co.*, 12 Barb. 440.

In the case of *Merrifield v. Cobleigh*, 4 Cush. 184, the owner of land made a deed of a part, with the condition that when-

ever the grantee, his heirs or assigns, shall neglect or refuse to support the fence, the deed shall be void. Shaw, C. J., says, such a condition, when relied on to work a forfeiture, is to be construed with great strictness. The demandant shall have his exact legal right, but no more: *Bradstreet v. Clark*, 21 Pick. 389. And the action failed for want of a request, without which there would be neither a neglect nor a refusal.

Upon these principles, it is held that where a condition applies in terms to the grantee, or lessee, without mention of heirs, executors, or assigns, the condition cannot be broken after the death of the grantee or lessee. If heirs and executors are named, but assignees are not, it will not be broken by any act of an assignee.

Thus in *Anonymous*, Dyer, 65, a question was asked upon the words of a lease, to wit: "And it shall not be lawful for the lessee to give, sell, or grant his estate and term to any person whatever without license of the lessor, under penalty of the forfeiture of said term." The lessor and lessee died, and the executors sold the term without license of the heir. It was held that this was not a forfeiture, because the restriction was only during the lives of the lessor and lessee: Cited Com. Dig., tit. Condition, F.

In *Cobb v. Prior*, 2 Leon. 35, S. C., Latch, 20, and 2 Leon. 48, it is held that if a man devises land to his wife during the minority of his son, upon condition that she shall not do waste, and dies, and his wife marries again, and dies, and after the husband commits waste, the condition is not broken, because a condition to avoid an estate shall be taken strictly: Vin. Abr., tit. Condition, M, a, 8.

In the Year-book, 27 H. 8, 14, 15 (Bro. Abr. 151), the case was that the prior of St. Johns leased for years, provided that if said prior, or any of his friars, should wish to inhabit the premises, and give a year's notice, the lessee should remove. The prior died, and his successor gave the year's notice; and it was held that as the successor was not named, the condition did not extend to him; and the judges held that if a lease is made upon condition, etc., that the lessor may enter, and do not speak of his heirs or successors, by the death of the lessor the condition is extinct.

In *Dumpe's Case*, 4 Coke, 119, S. C., 1 Smith's Lead. Cas. 15, S. C., *sub nom. Dumper v. Syme*, Cro. Eliz. 815, the same strictness is found, where it was held that a condition in a lease for years, that the lessee or his assigns should not alien-

ate without license of the lessor, and license was given to make one assignment, the condition would not bind the assignee.

So it was held by two judges in the case in *Anonymous*, Dyer, 152, cited in *Dumport's Case*, *supra*, where a proviso in a lease was that the lessee and his executors should not alien to any person without license of the lessor, but only to one of the sons of the lessee, and the lessee died, and his executors assigned it over to one of his sons that the son might alien to whom he pleased without license.

In *Whitchot v. Fox*, Cro. Jac. 398, there was a lease for years, with a condition that the lessee should not alien but to his wife during her life, and the residue to his children, or one of his youngest brethren, upon pain of forfeiture; the lessee assigned the term to his brother; it was held the baron might not alien to his wife, therefore in that point the condition is void, and thereby liberty is given to alien to his brother, and when he has aliened to him, the condition is dispensed with, and he may alien to whom he pleases.

In *Lynde v. Hough*, 27 Barb. 415, it was held that the extent and meaning of a condition, and the fact of a breach, are questions *strictissimi juris*; and a plaintiff, to defeat an estate of his own creation, must bring the defendant clearly within its letter. And where it was shown that a third person was in the occupation of part of the premises, but it did not appear whether he was in under the lessee himself or under an assignee of the lease, it was held by the court that if he was in under an assignee, it was no breach of a condition that the same or any part thereof should not be let or underlet without the written consent of the landlord, under penalty of forfeiture; that the covenant was both collateral and merely personal. It is the engagement of the lessee for himself alone, not naming his assigns, whether actual or legal; and if he had a right to assign the whole term, his assignee takes the estate without the condition, as not being bound by it; and the words "let" and "underlet" do not mean an assignment of the whole term.

In the case before us the condition is in terms confined to the grantee, "if the said George Simpson shall neglect," etc., without mention of heirs, executors, administrators, or assigns, and it comes, therefore, fully within the principle of the cases referred to. The condition is personal, and bound George Simpson alone, and no breach is shown during his life.

An argument is drawn from the word "forever," that the charge of maintaining the fence was intended to be a permanent condition. We think it is more than neutralized by the term "at his own expense," which limits it to the grantee in person.

Judgment is to be rendered for the defendant, unless one of the parties shall elect a trial by jury.

CONDITIONS SUBSEQUENT IN DEED NOT FAVORED: *Taylor v. Sutton*, 60 Am. Dec. 682; *Cross v. Carson*, 44 Id. 744, note.

PARTY WHO CLAIMS TITLE DERIVED FROM NON-PERFORMANCE OF CONDITIONS SUBSEQUENT is bound to show his title complete and perfect: *Whitton v. Whitton*, 75 Am. Dec. 163.

THE PRINCIPAL CASE IS CITED to the point that conditions which go to destroy or divest estates or rights are to be strictly construed, in *Barnes v. Company*, 45 N. H. 26; and is cited in support of the same principle, in *Peris v. Renshaw*, 49 Ill. 432.

FRINK v. FRINK.

[43 NEW HAMPSHIRE, 593.]

PART OF ORDINARY DUTY OF CLERK OF COURT OF RECORD is to extend the records of the court, from the process and pleadings on file, and from the minutes and entries on the dockets; and he cannot resort to extrinsic evidence for that purpose. He has the right to rely upon the entries made as correct, and if, from their inaccuracy, errors are found in the record as extended, the fault is not his.

COURT HAS IMPLIED AUTHORITY TO AMEND ITS RECORDS, so as to make them conform to the facts and truth of the case, and may do so upon any competent legal evidence.

PETITION to amend the record of a judgment in favor of defendant, Mrs. Frink. The defendant brought her writ of entry against the plaintiff to recover the whole of two tracts of land, and the case came on for trial at a term of the court of common pleas, as it was understood, upon the general issue. By consent of parties, a verdict was directed for the plaintiff for one half of the demanded premises, but the only entry was "verdict for the plaintiff," without saying "for half the demanded premises." Writs of possession were subsequently issued to Mrs. Frink for the whole of the demanded premises. Upon renewal of the controversy in the supreme court, to the office of the clerk of which the records of the court below had been transferred, the clerk, acting under the advice of the chief justice, extended the record upon the papers he had, showing

a recovery of all the demanded premises, and for the first time entered upon the docket the issuing of the writs of possession. These things were done without notice to the petitioner or his counsel, and he now asks for an amendment of the record. Mr. Smith, who appeared as counsel for the defendant, claimed title to the premises as a *bona fide* purchaser without notice.

J. S. H. Frink and Hatch, for the plaintiff.

Smith, for the defendant.

By Court, BELL, C. J. It is part of the ordinary duty of the clerk to extend the records of the court from the process and pleadings on file, and from the minutes and entries on the dockets: *Willard v. Harvey*, 24 N. H. 349. He has the right to regard the entries made, and the process issued by his predecessors as correct: *Fay v. Wenzell*, 8 Cush. 317; and if from their inaccuracy, errors are found in the record as extended, the fault is not his. He has no power, and it is no part of his duty to inquire elsewhere, and he has no right to cite others before him, or to decide upon extrinsic evidence. In this case the clerk found upon the docket the entry of a general verdict for the plaintiff. He was right in regarding it as a general verdict for the whole of the demanded premises. The proper entry of the verdict, if it was returned for a part only, was verdict for the plaintiff for half the demanded premises, and for the residue for the defendant. The attempt to cast censure upon the clerk who made the record is groundless. It was the duty of the counsel to his client to see that there was a verdict signed, and that it was for no more than was ordered.

Every court exercising a continuing jurisdiction — having an office for the preservation of its records, and the charge of those records by a proper officer — has by law an implied authority to amend its records, to make them conform to the facts and truth of the case: *Remick v. Butterfield*, 31 N. H. 85 [64 Am. Dec. 316]; *Dudley v. Butler*, 10 Id. 284; *Willard v. Harvey*, 24 Id. 344; *Claggett v. Simes*, 31 Id. 56; or as the same doctrine is well expressed by Fletcher, J., in *Balch v. Shaw*, 7 Cush. 284, there can be no doubt that it is competent for a court of record, under its general inherent and necessary authority, to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case. And this may be done at any time, as well after as during the term. The length of

time in this case (twelve years) between the granting [of the license and the making up of the record, does not take away the right or jurisdiction of the court: *S. P., Fay v. Wenzell*, 8 Cush. 317; *Limerick, Petitioner*, 18 Me. 186; *Lothrop v. Page*, 26 Id. 121; *Woodcock v. Parker*, 35 Id. 138; *Lewis v. Ross*, 37 Id. 234 [59 Am. Dec. 49]; *Weed v. Weed*, 25 Conn. 337; *Chichester v. Cande*, 3 Cow. 39 [15 Am. Dec. 238]; *Hunt v. Grant*, 19 Wend. 90.

This authority not only extends to the correction of clerical errors, but to the restoration of papers which have been improperly altered or defaced, and the substitution of new ones where the originals are purloined or lost: *Douglass v. Yallop*, 2 Burr. 722; *Hollister v. Judges*, 8 Ohio St. 201.

It is contended, and so are some of the authorities, that an amendment of a record cannot be made unless there is something to amend by, by which is understood something upon the files or records of the court: *Wendell v. Mugridge*, 19 N. H. 112; *Atkins v. Sawyer*, 1 Pick. 354 [11 Am. Dec. 188]; *Grenville v. Smith*, Cro. Jac. 628; *Mason v. Fox*, Id. 632. But in other cases such amendments have been made according to the minutes of the judge: *Coughran v. Gutcheus*, 18 Ill. 390; *Brady v. Little*, 21 Ga. 132; *Petrie v. Hannay*, 3 Term Rep. 659; 1 Tidd's Practice, 661; *Newcomb v. Green*, 1 Wils. 33; S. C., 2 Strange, 1197; *Eddowes v. Hopkins*, 1 Doug. 376; *Tarlton v. Fisher*, 2 Doug. 672. Here we have the minutes of the judge and counsel entirely clear upon the point.

But we think it clear, upon the authorities, that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it,—what was the proper entry to be made on the docket, and how the record should be extended: *Fay v. Wenzell*, 8 Cush. 317; *Balch v. Shaw*, 7 Id. 284; *Limerick, Petitioner*, 18 Me. 186; *Weed v. Weed*, 25 Conn. 337; *Hollister v. Judges*, 8 Ohio St. 201, before cited.

Where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution: *Porter v. Vaughan*, 22 Vt. 273; *Coughran v. Gutcheus*, 18 Ill. 390.

The position that the title has passed into the hands of a *bona fide* purchaser without notice signally fails. A letter, written by the purchaser only a little more than half a year before his purchase, shows that he then well knew that his

sister's title extended to one half the premises only. There is nothing but the singular forgetfulness of right displayed by the claim, which gives any color to the pretense that the facts could be forgotten.

The amendment is allowed.

POWER OF COURT TO AMEND RECORD: *Hill v. Hoover*, 68 Am. Dec. 70, and note.

AMENDMENT OF JUDGMENT: *Smith v. Redus*, 44 Am. Dec. 429; *Smith v. Hood*, 64 Id. 692, and note; *Houston v. Williams*, 73 Id. 565; *Gunn v. Howell*, Id. 484; *Bryan v. Miller*, 75 Id. 107; *Dodds v. Combs*, 77 Id. 150.

TO JUSTIFY AMENDMENT OF JUDICIAL RECORD, there must be something to amend by: See *Raymond v. Smith*, 71 Am. Dec. 453.

MOSES v. ELA.

[43 NEW HAMPSHIRE, 557.]

INDORSER OF PROMISSORY NOTE IS ENTITLED TO NOTICE OF DISHONOR, although he receives of the makers a mortgage of all their property to indemnify him against liability.

DEMAND AND NOTICE ARE NOT NECESSARY if, as between the maker of a note and the indorser, the duty to pay is upon the latter.

WITNESS WAS PERMITTED TO CORRECT HIS TESTIMONY by stating, after having testified that a paper produced by him was a copy of a notice of protest sent to an indorser, that, in respect to the direction, it was not a copy.

ASSUMPSIT by indorsee against indorser of promissory note. Verdict for the plaintiff, and the defendant moved for a new trial. The opinion sufficiently states the case.

Hackett, for the defendant.

Marston and Collins, for the plaintiff.

By Court, BELLows, J. This is an action by the indorsee against the defendant, as the indorser of a promissory note made by J. K. & S. Merrill, and payable to the defendant's order in six months. There was evidence tending to prove that the defendant took a mortgage of the makers of all their property to indemnify him for indorsing this and other notes for them, a considerable portion of which property was disposed of by them, with Ela's consent, and applied to other purposes. The court instructed the jury that if, after signing the note, and before its maturity, the defendant received from the makers a mortgage of all their property to indemnify him for signing this and other notes, he must be considered as

having waived demand and notice; and such is the doctrine of many decided cases, among which, a leading one, is *Bond v. Farnham*, 5 Mass. 170 [4 Am. Dec. 47], where, although the property was not sufficient to indemnify the indorser, yet as it was all the maker had, it was held by Parsons, C. J., that a demand would be fruitless, and the indorser must be considered to have waived it, and as having engaged with the maker, on receiving all his property, to take up his note. No authorities, however, were cited, and a verdict having been taken by consent, the question must have been whether a jury, upon the evidence, could have found for the plaintiff. A similar doctrine is laid down in *Story on Promissory Notes*, secs. 281, 283; *Story on Bills*, sec. 374; *Chitty on Bills*, 10th Am. ed., 358, in notes. So also are *Mead v. Small*, 2 Me. 207 [11 Am. Dec. 62]; *Prentiss v. Donelson*, 5 Conn. 175 [13 Am. Dec. 52]; *Duvall v. Farmers' Bank of Maryland*, 9 Gill & J. 31 [23 Am. Dec. 558]; *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Taylor v. French*, 4 E. D. Smith, 458; *Barton v. Baker*, 1 Serg. & R. 334 [7 Am. Dec. 620]; *Carlisle v. Hill*, 16 Ala. 398; *Stephenson v. Primrose*, 8 Port. 155 [33 Am. Dec. 281]; *Kyle v. Greene*, 14 Ohio, 495.

On the other hand, it is contended that mere indemnity does not dispense with notice, unless the indorser has come under obligation to the maker to pay the debt. Such is the doctrine of *Kramer v. Sandford*, 4 Watts & S. 328 [39 Am. Dec. 92], where Gibson, C. J., says the contrary has no footing in Westminster Hall. In *Denny v. Palmer*, 5 Ired. L. 610, Ruffin, C. J., has examined the subject with great care and ability, and his conclusion accords with the views of Gibson, C. J., before referred to; holding that if the note be for the accommodation of the indorser, or if the maker place funds in his hands to meet it, he is not entitled to notice; but that no agreement to take up the note is to be implied by law from the fact that the maker has mortgaged all his property, as indemnity, to the indorser; and that in such case notice is necessary; and he considers *Bond v. Farnham*, 5 Mass. 170 [4 Am. Dec. 47], which is often cited as the leading case, as standing upon the ground that there was evidence upon which the jury might have found that the indorser had agreed to pay the note, which agreement he supposes was the foundation of that decision. If not so to be understood, then it must be regarded as overruled by *Creamer v. Perry*, 17 Pick. 332 [28 Am. Dec. 297], where the maker assigned property to a trustee to indemnify

the indorser, among other things, for his liabilities as such, and it was held that notice was not dispensed with, Shaw, C. J., holding that the assignment was an indemnity against his legal liabilities, and as that was only conditional upon his having due notice, the lien upon the fund depended also upon the same condition: See also Rand's note to *Bond v. Farnham*, 5 Mass. 170, ed. 1835 [4 Am. Dec. 47].

In our own state, in *Woodman v. Eastman*, 10 N. H. 367, it is laid down by Parker, C. J., that the indorser who has received a mortgage of the maker for his security is still entitled to notice. He says (page 367) that the fact that the indorser, if compelled to pay, will not suffer loss, can hardly modify or control the ordinary legal rights or liabilities of the parties arising from the indorsement. The same principle is recognized in *Seacord v. Miller*, 13 N. Y. 55; and *Marston v. Bank of Mobile*, 10 Ala. 284; *Spencer v. Harvey*, 17 Wend. 489.

Upon a careful examination of the cases, we are fully satisfied with the decision of our own court in *Woodman v. Eastman*, 10 N. H. 367, and it is, we think, conclusive upon the case before us. In both cases the indorser had security by mortgage, and the only difference is, that here all the maker's property was mortgaged, while in *Woodman v. Eastman*, *supra*, it may have been otherwise; but in this case the property was suffered to remain in the makers' possession, and they were allowed to dispose of it for other purposes. The fact that all their property was thus mortgaged, unless shown to be ample security, can bear only upon these views, namely, that a demand might be of no avail, for want of means in the makers; and also that the notice would not, for the same reason, enable the indorser to obtain further indemnity. As to the first, it is settled that insolvency in the maker is no excuse for not giving notice: *Lawrence v. Langley*, 14 N. H. 70; *Benedict v. Caffé*, 5 Duer, 228; Story on Promissory Notes, sec. 286, and cases; Chitty on Bills, 10th Am. ed., 354, and notes. As to the second point, the notice would at least, as suggested by the defendant's counsel, put the indorser upon his guard, to take possession of the property mortgaged and turn it to the best account. When funds for meeting the note are placed in the indorser's hands to be so applied, it may well be regarded that he has undertaken to pay it, and notice in such case could not reasonably be required; and it would be the same where the indorser had expressly agreed to pay it upon having funds placed in his hands. But a mere indemnity, by the way of

mortgage, giving to the indorser no funds which he could apply to the payment of the note when due, stands upon a footing entirely different, and furnishes no evidence of an agreement to pay the note. In fact, only the maker himself could apply the property so mortgaged to the payment of the note, at its maturity; and therefore it cannot be reasonably urged that an agreement by the indorser to pay can be inferred from the mere fact of the mortgage, inasmuch as the duty to pay remains as before upon the maker, and he alone can apply the property mortgaged to that object; and upon payment, the lien of the indorser is gone.

The obligation to give notice arises from the fact that the duty to pay is upon the maker, and that the indorser may rightfully rely upon his making payment, unless he is duly notified of his failure to do so; and such is the contract between the indorser and indorsee. If, however, by a contract between the maker and indorser, the duty to pay is upon the latter, as when the maker signs the note for the accommodation of the indorser, who receives the money, or when the maker places in the hands of the indorser the money to pay it, and he assumes to do so, then demand and notice are not necessary; because, as between the indorser and the maker, the duty to pay is upon the former, and no remedy over is affected by want of notice. In the case of insolvency, or security by mortgage merely, without placing in the indorser's hands the means of present payment, there is no ground for saying that his remedy over cannot be affected by a failure to make the due presentment which is implied in every contract of indorsement as a condition for the indorser's liability. In the case of insolvency, it is not certain that the maker may not, through his friends, or otherwise, have provided the means to pay the note when presented; and to the benefit of that chance, the indorser, by the terms of the contract, is entitled. So, too, he is entitled to notice of the dishonor, that he may himself judge what steps shall be taken: *Story on Promissory Notes*, sec. 286, and note 1; and *Chitty on Bills*, 10th Am. ed., 354, and notes; *Camidge v. Allenley*, 6 Barn. & C. 373. In the case of a mere mortgage, it is obvious that in a large portion of instances, notice would be still more important to the indorser, that he might at once take measures to make his security available. On this point, then, we hold the instructions of the court to be erroneous.

The other point made by the defendant is not now impor-

tant, and is not likely to arise upon another trial; but it will be difficult to distinguish this from the admission of evidence to prove some fact in contradiction to what another witness, introduced by the same party, has already testified; and this clearly may be done: 1 Greenl. Ev., sec. 443, and notes. In the case before us, a witness had testified to the sending a notice of protest to the defendant, and to show the contents of it, read what he said was a copy, but was afterward permitted to state that, in respect to the direction, it was not a copy. At least such seems substantially to be the construction of the case as given by the defendant's counsel. If this be so, we see no objection to such correction, inasmuch as the contents of the notice might be shown by parol evidence.

But on the other point, the verdict must be set aside, and there must be a new trial.

WAIVER BY INDORSER OF DEMAND AND NOTICE BY TAKING SECURITY: *Marshall v. Mitchell*, 58 Am. Dec. 697, and note; *Olendorf v. Swartz*, 63 Id. 141.

THAT NOTICE OF DEMAND AND NON-PAYMENT NEED NOT BE GIVEN to indorser who has taken a deed of all the maker's property before the note falls due, see *Walters v. Munroe*, 77 Am. Dec. 323.

BASSETT v. SALISBURY MANUFACTURING COMPANY.

[43 NEW HAMPSHIRE, 569.]

LAND-OWNER HAS NOT ABSOLUTE AND UNQUALIFIED RIGHT to the unaltered natural drainage or percolation to or from his neighbor's land.

OWNER OF DAM ON WATERCOURSE MAY BE LIABLE FOR FLOWING BACK WATER so as to obstruct the natural drainage of land lying near, but not bordering on the watercourse, unless such obstruction was caused by a reasonable use of his own land and privilege, and what is a reasonable use is ordinarily a mixed question of law and fact.

IT IS NOT ESSENTIAL TO WATERCOURSE that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the waters entirely unmixed with earth, or flowing with any fixed velocity.

CASE. The substantial grievance alleged against the defendant was the maintaining a dam across a stream, and flowing the water of the stream back so as to obstruct the natural drainage from the plaintiff's land above the dam, to his injury. It was made a question whether there was a watercourse on the plaintiff's land, and it was in evidence that a few years previously the then owner of the land dug a ditch on it, about ten rods long, beginning at the line on the side nearest the

stream. But there was no evidence that a ditch had ever been there before. To the instructions given, and to the refusal to give the instructions requested on the trial, the plaintiff excepted, and the verdict being against him, he moved for a new trial.

H. F. French, and Marston and Towle, for the plaintiff.

S. M. Wilcox, and Christie and D. Clark, for the defendant.

By Court, BARTLETT, J. No land-owner has an absolute and unqualified right to the unaltered natural drainage or percolation to or from his neighbor's land. In general, it would be impossible for a land-owner to avoid disturbing the natural percolation or drainage, without a practical abandonment of all improvement or beneficial enjoyment of his land. Any doctrine that would forbid all action of a land-owner, affecting the relations as to percolation or drainage between his own and his neighbors' lands, would in effect deprive him of his property; and so far from being an application of the maxim, *Cujus est solum*, etc., would work a general denial of effect to it. If A has the absolute and unqualified right to receive from and discharge into the adjoining land of B all the drainage and percolation, as they naturally flow between that land and his own, this is substantially a right to a use of B's land, practically depriving the latter of all beneficial enjoyment of his property, and in effect amounting to an appropriation of it; and as B and the other neighboring land-owners must have similar rights, the improvement, or beneficial occupation of land, becomes in fact impossible, and property in the soil for nearly all useful purposes is annihilated. But we do not think it follows from this, as some recent cases have held, that a land-owner has the full and unlimited ownership, and the absolute and unqualified right of control of all water in or upon his land, not gathered into natural watercourses; for the non-existence of an absolute right does not conclusively disprove the existence of a qualified right. Nor do we think that the maxim cited can be applied to establish an unqualified ownership of such waters in all cases, any more properly than it can be relied on to prove an absolute property in all the air within one's bounds. If the land-owner has the absolute and unqualified ownership of all such water in or upon his land, his neighbor, by digging or otherwise, has no more right to take away his property water than his property sand. If, as respects the soil, he may dig as he pleases, he is still in

general, limited by the rule that in digging he must not take away his neighbor's soil, by effectually removing its natural supports. If a natural pond, of uniform depth, is equally divided between two land-owners, or if they have dug a well, half on the land of each, it perhaps would not be claimed that one may pump his half of the pond or well dry, without regard to the half of his neighbor. But however this may be, if the water, not gathered into natural watercourses, belongs absolutely to the owner of the land, because it is part of the soil, and for that reason only, it must be subject to the same law as the other components of the soil,—the sand, loam, and rock,—which may not ordinarily be removed by an adjacent owner, by the withdrawal of their natural supports; for the maxim from which such ownership is deduced, when applied without qualification, as it must be to lead to this conclusion, allows no sound distinction.

But such a doctrine would lead to exactly the same mischiefs that have caused the rejection of that first discussed; it would prevent all improvement or beneficial enjoyment of land in precisely the same way. To be sure, the language and the doctrines of some of the cases would seem to allow the land-owner, not only all the water in his land, but all he can draw thither; but such a rule, it seems to us, is in direct conflict with the principle upon which the theory is founded, and must lead in many cases to an interminable struggle for possession or removal of waters in the soil. Indeed, we do not know of any decision that perfectly carries out this doctrine of absolute ownership to its logical result; but so far as we are aware, the cases maintaining it go no further than the somewhat illogical view last suggested; probably because of the entire incompatibility of the former with any beneficial use of land. But this departure from the principle upon which they found their theory does not seem to us to have saved them from difficulty or inconsistency. Nor do we think a sufficient foundation for this doctrine of absolute ownership can be found in the alleged difficulty of determining the direction and extent of percolation and drainage. In a large number of cases no such difficulty exists, and the remainder may be provided for consistently, and in accordance with settled legal principles. We need not examine the argument as to the non-existence of a presumed grant, drawn from this alleged difficulty, for we do not understand the theory of our law of watercourses to rest upon any such foundation; nor need we inquire whether some of the

cases which use the term "common consent," in treating of the supposed origin of aquatic rights, may not have confounded that with the doctrine of presumed grants which could come from particular persons only in any given case.

If this doctrine of absolute ownership is not well founded in legal principles, certainly there is nothing in its practical operation that so commends it to our approval as to lead to its adoption. It must, if held as in several cases, leave everywhere a conflict of right and enjoyment, irreconcilable in law or in fact; and however held, it will, in a variety of cases, lead to incalculable mischiefs. Logically followed out, this doctrine, if confined to the water naturally in or upon the land, would forbid almost all interference by each land-owner with his own land; or if applied to all the waters found in or upon the land, not gathered into natural watercourses, would take away all remedy for malicious acts in relation to them. But the injustice of the latter result has led to an exception in several jurisdictions, that seems anomalous under the theory they adopt. As already suggested, we are not aware that any of the cases have followed this doctrine of absolute ownership rigidly to its logical conclusion, so as to forbid all interference with another's property water, situate in his land; but even when not pursued so far, it gives rise to other inconsistencies. If A owns a tract of land upon the westerly bank of a river, he may maintain an action against B, who, by obstructing the river, throws its waters into his soil throughout its whole extent, unreasonably, and to his injury, and recover for the entire damage; else we must hold that A can only recover for the injury to the film of soil in immediate contact with the watercourse, and for the raising of the water in the channel over his land; and we can see no legal distinction in this respect between throwing water into or upon another's soil. But if A sells to C the easterly half of his land, he loses all remedy for the continuance of the same injury to the residue of his land; or if he sells to C the westerly half, C can have no remedy for the same injury, since the water only percolates through the land of A. Or if a distinction is asserted between the water of the river and the water in the soil in such case, suppose B, instead of throwing the water of the river itself into C's land, by unreasonably obstructing the stream, forces the river water into the land of A, and thereby drives from the latter's land into the land of C an amount of water precisely equal to that first supposed, producing exactly

the same injury to it, is C to be without remedy, where the injury is the same, produced in the same general way, and by the same cause, because of a difference, not in the nature or effects of the water, but merely in its immediate and not necessarily its ultimate source? Such distinctions and such results do not commend themselves to our judgment. Upon this theory you can have no more right to remove from your neighbor's land a film of water than a film of clay, for both are equally and absolutely his property. It cannot be held that you have the right to dig as you please upon your own land near a neighbor's well, provided "the last rib of earth" that holds the water is not removed, even though the effect of the operation may be to drain the well by percolations; for upon this theory, why the proviso? Practically, the same result is reached in either case; and if the proposition were correct, it would follow that here the law allows indirectly what it forbids directly. If the prohibition has any reason, it is the preservation of the neighbor's well; or in other words, of his water in it, for that is its only valuable purpose. And this reason is equally applicable in either case. We think that no foundation for such a distinction can be found in the law. If the last rib of earth is yours, you may, upon this doctrine, remove it because it is yours, and because of your right to do as you please with your own; and any denial of your right, in such case, because of your neighbor's well, strikes at the foundation of the whole theory. If it is your neighbor's, you have no right to remove it, solely because it is his, and not because it confines the water in his well. It is to be observed, however, that the allowance of the removal of the last rib of earth, in such case, when it belongs to yourself, disregards the absolute rights given to the neighbor by the same theory, quite as much as the denial of that right would disregard your own.

It seems to us inconsistent to hold that, ordinarily, you may not drain a watercourse by digging away the bank, which is your land, and yet to sustain a doctrine which would allow you to dig so near it as to draw off all its water by percolation. In either case, you deal directly with your own merely; but in the former you are forbidden, only because by so doing you take what is not absolutely your own; because you drain a watercourse. This is the sole and the sufficient reason. In the other case exactly the same reason exists for not doing a similar act, producing precisely the same effects that con-

stitute the only objection in the former, and therefore the law of the cases should be the same; and it would seem to follow that ordinarily you may not drain a watercourse dry by means of percolation into your pits. Although the law does not generally allow one directly to deprive the land-owners below of the natural advantages of a common watercourse, yet this doctrine, as held in some of the cases, would sometimes permit this mischief indirectly, by allowing all the sources of supply to be cut off from the stream.

But it is unnecessary to multiply examples, or follow the doctrine in its varied applications; for we think enough instances have been selected to show the nature of the difficulties attendant on it. The law regulating watercourses has its origin or foundation in the benefits and injuries that may arise from water; and among the former the propulsion of machinery is but one of many. These benefits and injuries may often be quite similar in cases of underground and surface drainage, and of drainage by watercourses. In such inquiries the ultimate source of the water is never regarded; and the immediate source seems to us equally immaterial, since it in no way changes the nature or effect of the water; and the regulations now settled by the law of watercourses were established, not because of any peculiarity in the origin of water in streams, but because of the good or harm that may result from its management or use. Therefore, so far as a similarity of benefits and injuries exists, there should be a similarity in the rules of law applied. Whether the deposition or detention of water in or its removal from land is caused by a watercourse, or by other means, can create, ordinarily, no difference in the effect of such deposition, detention, or removal.

We think it does not follow, as some of the cases seem to assume, that because a land-owner has not the absolute and unrestricted right of drainage to or from his neighbor's land, he has no rights of drainage whatever, and that each land-owner has the entire and unqualified ownership of all water found in his soil, not gathered into natural watercourses, in the common acceptance of that term.

There is another view entitled to consideration. If the rights are not absolute and unqualified, they are qualified, or there are no rights at all. We need not argue that some rights exist; that the owner of the land may make some use of the water in it; that he may do some acts that will affect

to some extent the drainage; that a well may be dug, under some circumstances, although it will draw water by percolation from a watercourse, from adjoining land, or even from the well of a neighbor. If the views we have expressed are correct, they have already indicated the sole ground of the qualification of the land-owner's right in such cases, and that is, as in certain cases of watercourses, the similar rights of others; and this will, of course, determine the extent of the qualification, which, as in the analogous cases suggested, and for the same reasons, is the rule of reasonable use,—of a reasonable exercise of one's own right. The rights of each land-owner being similar, and his enjoyment dependent upon the action of the other land-owners, these rights must be valueless unless exercised with reference to each other, and are correlative. The maxim, *Sic utere*, etc., therefore applies, and, as in many other cases, restricts each to a reasonable exercise of his own right, a reasonable use of his own property, in view of the similar rights of others. Instances of its similar application in cases of watercourses, where the detention, pollution, or unnatural discharge of the water is complained of, of highways, of alleged nuisances in regard to air or by noises, etc., and of the manner of the application, are too numerous and familiar to need more special mention. As in these cases of the watercourses, so in the drainage, a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others. The rights are correlative, and from the necessity of the case, the right of each is only to a reasonable user or management; and whatever exercise of one's right or use of one's privilege, in such case is, under all the circumstances, and in view of the rights of others, such a reasonable user or management, is not an infringement of the rights of others; but any interference by one land-owner with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable. Every interference by one land-owner with the natural drainage, actually injurious to the land of another, would be unreasonable, if not made by the former in the reasonable use of his own property. Although the plaintiff's land was not situated upon the river, yet if the defendants, by means of their dam, obstructed its natural drainage to the actual injury of the plaintiff, they are liable, unless the obstruction was caused by the reasonable use of their own land or privilege; and the reasonableness of the use would depend upon the circumstances of the case. What, in any

particular case, is a reasonable use or management, is ordinarily a mixed question of law and fact, to be submitted to the jury under the instruction of the court.

There is no necessary conflict between these views and the cases which hold that a riparian proprietor below has in general no right to raise the water of the stream above its natural level upon the land of a riparian proprietor above. From a right to the reasonable use of one's own property or privilege, there does not usually result any right to the reasonable use of another's property or privilege. It may be that in case of such flowage the law holds the use unreasonable, or that no question of reasonableness arises, because there may exist no necessity in the case that one should be allowed thus to flow back upon the land of his supra-riparian neighbor similar to the necessity which requires the application of the doctrine of reasonable use in cases of the unnatural detention, discharge, or pollution, of the waters of a stream, and of drainage, in order that each proprietor should have any practically valuable enjoyment of his unquestioned right or property. But these matters are not necessarily before us here, and we do not intend to pass upon them at the present time.

In this view, we encounter none of the objections that we have suggested as inseparable from the other doctrines, and it obviates some difficulties and anomalies that would otherwise exist. The law as to malicious acts ceases to form an exception to the general rule; and the cases of difficulty in the previous determination of the direction or extent of drainage are disposed of by the submission of this difficulty of determination to the jury as one of the matters of fact bearing on the question of reasonableness. Again, it is admitted that it is not essential to a watercourse that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the waters entirely unmixed with earth, or flowing with any fixed velocity; but the law does not and cannot fix the limits of variation in these particulars. Where a watercourse originates and is supplied from a natural lake, the current in the latter may be hardly perceptible, yet it may be doubted if any one could justify the entire withholding of its waters from the stream it should feed. Indeed, it is by no means certain that the entire absence of current in a lake would prevent the application of the general principles that protect the rights of land-owners on running streams; for perhaps it will be found that owners of land upon such lakes have similar qualified

rights to the enjoyment of these waters in their natural condition, and to the reasonable use of them, and may claim that the water shall not be unreasonably raised, lowered, or polluted to their injury. If the general principles governing the use of watercourses were to be applied, so far as may be, to all water naturally percolating or draining, then the occasion for a definition in the respects first mentioned would cease in many cases; and if they were to be extended to all water that may be put in motion by operations upon land, there then would be no call for any distinction in the principles, but only for an accurate discrimination of the facts essential to their correct application, with reference to the rights of others and the legal necessities of the cases under their varying circumstances. But these questions are not now before us, and we do not propose to examine them here.

The views we have adopted seem to us but an extension of rules, well settled and long applied in cases of similar water rights, to a class of cases but recently brought into much discussion before courts governed by the common law; and rules which, we think, accord with many analogies of the law, and will, in general, work no injustice or particular hardship to those interested.

We are aware that since the case of *Acton v. Blundell*, 12 Mees. & W. 324, the weight of authority elsewhere is against the view of the law which we have adopted. A number of cases have been cited by the defendant's counsel, and more may now be found, in which the reasoning conflicts with the conclusion at which we have arrived; but with the highest respect for the tribunals that have pronounced those decisions, we are compelled to differ from the views they have expressed. These cases are all of recent date, and a considerable number of conflicting decisions, and several dissenting opinions, show that their doctrines have not met with uniform acceptance. It is unnecessary for us to inquire into the merits of the results reached in these cases; for though we might be satisfied with such results in particular instances, we are unable to assent to the reasoning by which they have been reached. We are not aware that the doctrine of *Acton v. Blundell*, 12 Mees. & W. 324, and of the cases which follow it, has been adopted in any decision in this state; but so far as the subject has been considered at all here, we think our decisions have not tended in the direction of that case: See *Portsmouth Aqueduct Co. v. Concord and Portsmouth R. R.*, Rockingham, June

term, 1860 [not reported]; *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 451; *Rouse v. Addison*, 34 Id. 806; *Johnson v. Atlantic and St. L. R. R. Co.*, 35 Id. 569 [69 Am. Dec. 560].

The verdict must be set aside, and a new trial granted.

SUBTERRANEAN WATERS: See *Wheatley v. Baugh*, 64 Am. Dec. 737; *New Albany etc. R. R. Co. v. Peterson*, 77 Id. 60.

WATERCOURSES, AND RIGHTS IN: *Earl v. De Hart*, 72 Am. Dec. 305, and note.

RIGHTS OF RIPARIAN PROPRIETORS: *Stein v. Burden*, 65 Am. Dec. 304; *Walker v. Shepardon*, Id. 324; *Burwell v. Hobson*, Id. 247; *Delahoussaye v. Judice*, 71 Id. 521; *Kidd v. Laird*, 76 Id. 472; *Lorman v. Benson*, 77 Id. 435; *Mohr v. Gault*, 78 Id. 687, and note.

OWNER OF DAM MUST SO GOVERN AND CONTROL IT that injury will not result to his neighbors: *Fraser v. Sears Union Water Co.*, 73 Am. Dec. 562; *McCoy v. Danley*, 57 Id. 680, and note; *Barrow v. Landry*, 77 Id. 199.

THE PRINCIPAL CASE IS ALSO REPORTED in 3 Am. Law Reg., N. S., 222, and a note added containing a brief history of the law upon the subject, prepared by Judge Redfield. "This decision in Bassett's case was on exceptions taken at the fifth trial. The court below, at that trial, made the ruling reported purely upon the authority of *Acton v. Blundell*, 12 Mees. & W. 336, and the cases which have followed in its train, and contrary to the rule which had been applied at each of the previous trials. Few cases have ever undergone such protracted investigation and received such careful consideration by the full bench. At least four carefully prepared opinions were drawn up for consultation, but the one finally drawn up by Judge Bartlett was the unanimous judgment of the court": Reporter's note, in *Swett v. Cutts*, 50 N. H. 444.

THE PRINCIPAL CASE IS CITED, as an instance in which the court did not hesitate to be guided by principle rather than by authority, in *Boardman v. Woodman*, 47 N. H. 150; *Libson v. Lyman*, 49 Id. 604; it is cited to the point that a dam-owner, who wrongfully causes the water of a river to flow back upon the lands of a riparian proprietor perceptibly higher than its natural level, is liable therefor to such proprietor in nominal damages, though no actual damage is caused, in *Amoskeag Mfg. Co. v. Goodale*, 46 Id. 56; *Gerriek v. Clough*, 48 Id. 12, the latter case also distinguishing the principal case. To the point that in respect to water percolating through the soil, the land-owner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land, the principal case is cited in *Swett v. Cutts*, 50 Id. 444, 446, S. C., 11 Am. Law Reg., N. S., 11, where the later decisions on the subject are carefully collated in a note by Judge Redfield. It is cited to the point that there are many uses of land that are reasonable, although the land-owner knows they will cause a damage to his neighbor, in *Thompson v. Androscoggin Co.*, 54 N. H. 551; to the point that a sewer is not a natural watercourse, in *Vale Mills v. Nashua*, 63 Id. 137; and is cited as favoring the doctrine that an action will not lie for injuries caused by cutting off subterranean waters percolating the soil or running through unknown channels, and without a distinct and defined course, in *Trustees etc. v. Yowmans*, 50 Barb. 320; and see Id. 326, 328, where the principal case is distinguished. It is cited, and the doctrine therein laid down dissented from, in *Chase v. Silverstone*, 62 Me. 183, where it is held, reviewing many decisions, that each owner

of land may make a proper use of his own estate, and that sinking a well upon it is such proper use; and if water, accustomed to percolate in an unknown subterranean current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*.

REDINGTON v. CHASE.

[44 NEW HAMPSHIRE, 36.]

WHERE ONE OF TWO TENANTS IN COMMON OF QUANTITY OF "SHOT-IRON" TAKES POSSESSION OF ALL IRON, mixes it with other iron, manufactures the mixture into various iron wares, so that the common property can be no longer traced or identified, and afterwards sells or disposes of these wares, these acts amount to a conversion of the share of his co-tenant.

ACTION committed to an auditor, who, by consent of the parties, reported the facts. E. B. Parker, J. M. Spooner, and the plaintiffs in this action, H. C. Redington & Co., bought at sheriff's sale a quantity of shot-iron at two dollars per ton. The servant of the sheriff weighed off to the parties the iron purchased, and reported the weight to be twenty-nine tons and sixty-one pounds, and each of the purchasers paid one third of the price of that quantity of iron. Parker and Spooner sold their two thirds to one Wilcomb, who sold the same two thirds to the defendants. The plaintiffs thereupon agreed that the defendants might draw away two thirds of the iron, but requested them to leave one third of average quality. The defendants drew away 37,780 pounds, which was all they found there. The plaintiffs never had any of the iron, and there was no evidence that any one else had taken away any part of it, except the defendants. At the time of the sales above mentioned, and until the drawing away of the iron was nearly completed, it was supposed by all parties that the whole quantity of iron was twenty-nine tons and sixty-one pounds. The shot-iron so taken by the defendants was mixed with other iron, and the mixture manufactured into various kinds of iron-ware, so that the shot-iron could not be in any manner traced or identified, and the articles so manufactured were sold or disposed of prior to October, 1857. Before the commencement of this suit, the plaintiffs requested the defendants to account to them for their share of the shot-iron, but the defendants refused, claiming that they had taken no more than they bought of Wilcomb, and denying any liability to account to the plaintiffs, in any form, for

any portion of the shot-iron. The questions of law arising on the report were submitted to the court.

Farr, for the plaintiffs.

Hibbard, for the defendants.

By Court, BARTLETT, J. The plaintiffs owned an undivided third part of the shot-iron. The whole was taken by the defendants, who had purchased the other two thirds, and by them mixed with other iron, and manufactured into various kinds of wares, so that the shot-iron could no longer be traced or identified; and these wares were sold or disposed of by the defendants. We think these acts of the defendants placed the common property as completely beyond the plaintiffs' reach, as the destruction of it would. The case differs from *Fennings v. Grenville*, 1 Taunt. 241, where the extraction of the oil from the whale was, in fact, a preservation of the common property. There the chattel was turned to its common and profitable use,—to the only use ultimately intended or valuable,—and although the form was altered, the change would not prevent the other tenant from taking and using it, and without this change the common property must have been lost. But here was a conversion of the entire property to the defendants' use, made under circumstances from which no authority could be implied, and of such a nature that the plaintiffs could not afterward take or use the property.

It would, therefore, be necessary to inquire whether a sale of the entire property by one tenant in common is a conversion, if that were an open question in this state: *White v. Brooks*, 43 N. H. 402.

We are of opinion that there was a conversion of the plaintiffs' share of the iron, and there must be judgment for the plaintiffs on the report.

TROVER BETWEEN CO-TENANTS: See *Boddy v. Cox*, 74 Am. Dec. 64, note 68, where prior cases are collected.

CONFUSION OF GOODS: See *Robinson v. Holt*, 75 Am. Dec. 223, note 227, where other cases are collected.

FOGG v. PORTSMOUTH ATHENEUM.

[44 NEW HAMPSHIRE, 115.]

WHERE PERSON NOT REGULAR SUBSCRIBER FOR NEWSPAPER TAKES IT FROM POST-OFFICE through which it is regularly sent to him by the publisher, pays postage therefor, and upon bills therefor being sent to him, refuses to pay them, saying that he is not a subscriber, but still continues to receive the paper as before, neither returning it, nor giving notice to the publisher, the law will imply a promise on his part to pay for the paper according to the usual terms; and an action of *assumpsit* will lie to recover the amount found due within six years from the date of the writ.

ASSUMPSIT to recover the sum of forty dollars for the paper called the Independent Democrat, for the space of eleven years before the date of the writ. Plea, the general issue, with the statute of limitations. The defendants were a corporation, whose object was the support of a library and public reading-room. They took a large number of newspapers, for some of which they subscribed and paid, and others of which were sent to them gratuitously. On the 29th of November, 1848, one Miller, the agent of the then publishers of the paper, presented a bill to the defendants for the paper up to May 1, 1849, which they at first refused to pay, on the ground that they had not subscribed for it. They finally paid this bill to said Miller, and took upon the back of it a receipt in these words and figures: "Nov. 29, 1848. The within bill paid this day, and the paper is henceforth to be discontinued. T. H. Miller, for Hood & Co." Hood & Co. were the publishers of the paper up to February 12, 1849, when that firm was dissolved, and the paper was afterwards published by the present plaintiffs. The change of publishers was announced in the paper of February 15, 1849, and the names of the new publishers were conspicuously inserted in each subsequent number of the paper. The plaintiffs had no knowledge of the agreement with the agent of Hood & Co. to discontinue the paper until the defendants notified them after the paper had been furnished by them for a year or more. The paper was regularly forwarded to the defendants after the 1st of May, 1849, down to the 1st of January, 1860, and was during all that time constantly taken from the post-office by those in charge of the defendants' reading-room, and placed in the reading-room. During this period payment was several times demanded from the defendants, which they refused, on the ground that they were not subscribers for the paper. There were printed conspicuously in each number the following: "Terms of publication: By mail.

express, or carrier, \$1.50 a year, in advance; \$2 if not paid within the year. No paper discontinued (except at the option of the publishers), unless all arrearages are paid." The questions arising were reserved for the determination of the whole court.

Fowler and Chandler, for the plaintiffs.

W. H. Rollins and A. R. Hatch, for the defendants.

By Court, NESMITH, J. There is no pretense, upon the agreed statement of this case, that the defendants can be charged upon the ground that they were subscribers for the plaintiffs' newspaper, or that they were liable in consequence of the existence of any express contract whatever. But the question now is, Have the defendants so conducted as to make themselves liable to pay for the plaintiffs' newspaper for the six years prior to the date of the plaintiffs' writ, under an implied contract raised by the law and made applicable to this case?

If the seller does in any case what is usual, or what the nature of the case makes convenient and proper to pass the effectual control of the goods from himself to the buyer, this is always a delivery. In like manner, as to the question of acceptance, we must inquire into the intention of the buyer, as evinced by his declarations and acts, the nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; or this intention may be manifested by a great variety of acts in accordance with the varying circumstances of each case: 2 Parsons on Contracts, 325.

Again, the law will imply an *assumpsit*, and the owner of goods has been permitted to recover in this form of action, where they have been actually applied, appropriated, and converted by the defendant to his own beneficial use: *Hitchin* [or *Kitchen*] v. *Campbell*, 2 W. Black. 827; *Johnson v. Spiller*, Doug. 167; *Hill v. Davis*, 3 N. H. 384, and the cases there cited.

Where there has been such a specific appropriation of the property in question, the property passes, subject to the vendor's lien for the price: *Rohde v. Thwaites*, 6 Barn. & C. 392. In *Baines v. Jevons*, 7 Car. & P. 288, the question was, whether the defendant had purchased and accepted a fire-engine. It was a question of fact for the jury to determine. Lord Abin-

ger told the jury, if the defendant had treated the fire-engine as his own, and dealt with it as such, if so, the plaintiff was entitled to recover for its price. And the jury so found: 2 Greenl. Ev., sec. 108.

In *Weatherby v. Banham*, 5 Car. & P. 228, the plaintiff was publisher of a periodical called the Racing Calendar. It appeared that he had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook; Westbrook died in the year 1820; the defendant Banham succeeded to Westbrook's property, and went to live in his house, and there kept an inn. The plaintiff, not knowing of Westbrook's death, continued to send the numbers of the Calendar, as they were published, by the stage-coach, directed to Westbrook. The plaintiff proved by a servant that they were received by the defendant, and no evidence was given that the defendant had ever offered to return them. The action was brought to recover the price of the Calendar for the years 1825 and 1826. Talford, for the defendant, objected that there never was any contract between the plaintiff and the present defendant, and that the plaintiff did not know him. But Lord Tenterden said: "If the defendant received the books and used them, I think the action is maintainable. Where books come addressed to the deceased gentleman whose estate has come to the defendant, and he keeps the books, I think, therefore, he is clearly liable in this form of action, being for goods sold and delivered."

The preceding case is very similar, in many respects, to the case before us. Agreeably to the defendants' settlement with Hood & Co., their contract to take their newspaper expired on the 1st of May, 1849. It does not appear that the fact that the paper was then to stop was communicated to the present plaintiffs, who had previously become the proprietors and publishers of the newspaper establishment; having the defendants' name entered on their books, and having for some weeks before that time forwarded numbers of their newspaper by mail to the defendants, they, after the first day of May, continued so to do up to January 1, 1860. During this period of time the defendants were occasionally requested, by the plaintiffs' agent, to pay their bill. The answer was, by the defendants, we are not subscribers to your newspaper. But the evidence is, the defendants used, or kept the plaintiffs' books, or newspapers, and never offered to return a number, as they reasonably might have done if they would have avoided the liability

to pay for them. Nor did they ever decline to take the newspapers from the post-office.

If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given them notice that they declined to take the paper longer.

We are of opinion that the defendants have the right to avail themselves of the statute of limitations. Therefore the plaintiffs can recover no more of their account than is embraced in the six years prior to the date of their writ, and the sum of two dollars per year, with interest from date of writ, or the date of the earliest demand of the plaintiffs' claim upon the defendants.

In *Word v. Powell*, 3 Harr. (Del.) 379, it seems to have been held by the court that if a person continue to receive a paper or periodical sent through the post-office, he is liable for the subscription price. This decision was made by the superior court. The principal case, so far as we can ascertain, is the only one upon the subject which has been determined in the court of last resort in any state. Where a newspaper is voluntarily mailed to a person who has never subscribed for it, we do not know of any principle of law which requires him either to return it to the publisher or to refuse to take it from the post-office. A publisher certainly cannot thus force his wares upon the public. Where the publisher has no cause to believe that the person to whom the newspaper is forwarded is a subscriber, the forwarding of the newspaper ought to be regarded merely as a gift thereof.

KIMBALL v. KIMBALL.

[44 NEW HAMPSHIRE, 122.]

LIBEL FOR DIVORCE CANNOT BE PROSECUTED BY LIBELANT'S FATHER, or any third person, where the libelant died before the libel was entered, for the purpose of having the libelee excluded from a share in the estate of her husband, or from the custody of their child.

LIBEL filed August 27, 1862, set forth that the libelant, John B. Kimball, was married to Lydia S. Coffin on the 7th of May, 1857; that both of the parties then were and since have been inhabitants of Nashua, although said libelant has been temporarily absent in the service of the United States since the month of August, 1861. The libelant charged that the libelee had committed the crime of adultery since said marriage, with different individuals and at times to the libelant unknown, and in particular with one Francis Moss, or Morse, at Hudson, on the 30th of October, 1861, and at Manchester, on the 28th

of September, 1861, and at other times to the libelant unknown. The libelant prayed for a divorce and for the custody of their only child, Nellie M. Kimball. A copy of the libel and order of notice was duly served, and the libel was entered at the December term, 1862, and an entry was then made on the docket,—“Plaintiff dead.” Lewis Kimball, the father and next of kin of said John B. Kimball, then filed a motion in which he showed to the court that said libelant had deceased since the filing of the libel; that he left one child, the said Nellie M. Kimball, aged four years, living with and under the custody of said Lydia S. Kimball; that he left certain estate and claims in which said Lydia S. Kimball might have an interest unless barred therefrom by a decree of divorce in the cause, according to the prayer of said libel; and that according to the best information and belief of said Lewis Kimball, the said Lydia S. Kimball did commit the crime of adultery as alleged and set forth in said libel, and for that cause she ought to be barred from any claim in and upon the estate, property, and rights of the said John B. Kimball, and from all authority and control over the person or property of said infant. The said Lewis Kimball therefore prayed that he might be admitted to prosecute the libel to a final decree thereon, notwithstanding the death of said libelant, in the same manner as the said libelant might have done if living. The said Lewis Kimball filed an affidavit in support of this motion, in which he stated that the said John B. Kimball deceased at Hilton Head, South Carolina, on the 10th of November, 1862; that affiant had acted for and in behalf of said John B. Kimball in instituting said libel, and the prosecution of the same; and that he had no doubt, from the information which he had obtained, that the commission of adultery by said Lydia S. Kimball could be proved as alleged in the libel; that she was an unsuitable person to have charge of said infant; and that he was ready and desirous of taking the child into his care and of discharging toward her the duty of a parent, and that for that purpose as well as for the purpose of barring the said Lydia S. Kimball from any claim to the estate of the said John B. Kimball, which he believed she had forfeited, he was desirous of prosecuting the libel to a final decree.

By Court, BELL, C. J. There seems to us to be insuperable difficulties in the way of the allowance of this motion. The object of the suit is merely personal, to change the *status* or relation of the parties to each other; to put an end to the con-

nection between them of husband and wife. As incidental to that principal object, the court has the power to make decrees relative to alimony, to exonerate the wife's estate from the claim of the husband, and to make orders relative to the care and custody of the children. But all these are regarded as merely incidental to the decree of divorce sought, or perhaps to some decree of divorce already granted. The principal object in this case can no longer be reached. The marital relation has been already ended by the death of the husband and libellant. The court can no longer decree a divorce between parties, one of whom has ceased to live; and with the failure of the principal object of the bill, the incidents must also ordinarily fail. There may, perhaps, be cases where the court might order a decree to take effect from a former term, when the parties were living, where the case was ready for decision at such former term, and the entry of the decree was delayed for the convenience of the court; but that is not this case, the libellant's death having occurred before the entry of the libel in court, and before any of the papers had come into possession of the court.

The general rule at common law, and in the nature of things, is, that suits of all kinds abate by the death of the plaintiff. The action may be prosecuted, or revived, only in those cases where the right of the plaintiff survives to his personal representatives, his heirs, or executors. They cannot be prosecuted for the benefit of others who do not occupy the position of the plaintiff, though they may have rights of their own which might be settled by the action.

We are unable to recollect any case where a suit brought for the mere personal benefit of an individual, and in no way affecting rights of property, except incidentally, has ever been prosecuted by any other than the party himself, unless by virtue of some express statute.

It seems to be a leading and essential requisite to a decree of divorce that the fact of an existing marriage should be proved. Thus it is said, in Bishop on Marriage and Divorce, sec. 314: "In every divorce suit, on whatever cause founded, the plaintiff must allege and prove, first, his marriage with the defendant, and secondly, a sufficient breach of matrimonial duty": *Id.*, sec. 315. "The necessity of proving the marriage arises, not only from the fact that the marriage is an essential ingredient in the offense alleged, since no violation of matrimonial duty can take place where the matrimonial relation

does not exist, but likewise from the consideration that as divorce is the suspension or dissolution of this relation, if there is no relation subsisting, there is nothing for the divorce to act upon. And so marriage is the foundation of the whole proceeding, and the decree or sentence of divorce affirms the marriage in form and effect, as well as declares the separation."

It would seem that in England, in suits for nullity of marriage, third persons may prosecute. Thus (Bishop on Marriage and Divorce, sec. 317) Dr. Swabey, the judge, admitted on the authority of former decisions that if the suit were prosecuted by a person other than one of the parties to the marriage, and the proof of the fact of the marriage were not in the power of such a plaintiff, it might, without the proof, be declared void. Under the latter state of facts, the decree of the court would pronounce the marriage void, if any such were had. It is nowhere suggested that any such practice exists in libels for divorce. By the statute (R. S., c. 148, sec. 8; Comp. Stat. 377), "a divorce from the bond of matrimony shall be decreed for the following causes, in favor of the innocent party." By the language, no authority is conferred to decree a divorce in favor of a third person, or at his instance.

The motion must be denied.

DIVORCE AT INSTANCE OF THIRD PERSON OR AFTER DEATH OF ONE OF PARTIES.—A suit for divorce abates by the death of either of the parties pending the suit: *Brocas v. Brocas*, 2 Swab. & T. 383; *Grant v. Grant*, Id. 522; *Stanhope v. Stanhope*, L. R. 11 P. D. 103; S. C., 54 L. T., N. S., 906; S. C., 34 Alb. L. J. 230. In England, it is provided by statute that "every decree for a divorce shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall, by general or special order, from time to time, direct," etc.: 23 & 24 Vict., c. 144. In the case of *Grant v. Grant*, *supra*, Grant obtained a decree *nisi* for a divorce against his wife, and died before it could be made absolute. The guardian of the minor children of the petitioner then prayed to be allowed to intervene for the purpose of making the decree *nisi* absolute, and of obtaining an order of the court in respect to the marriage settlement. But the court held that the suit had abated by the death of the petitioner, and that no party had any right to move in the matter. The judge ordinary, in delivering the opinion in that case, said: "The suit abated by the death of the husband; there is an end of the matter, and I can do nothing more." In the late case of *Stanhope v. Stanhope*, *supra*, W. E. C. Stanhope commenced a suit against his wife for a divorce on the ground of her adultery. On the 11th of May, 1863, the court pronounced a decree *nisi* for the dissolution of the marriage. On the 27th of July, 1863, W. E. C. Stanhope died, before the decree *nisi* was or could have been made absolute. Under the will of the petitioner's father, who had died before the commencement of the divorce proceedings, the widow of the petitioner was, after his death, entitled to a life interest in

a certain fund. With a view to prevent the respondent, who had in the mean time married her co-respondent in the divorce suit, from obtaining the enjoyment of this life interest, on the 2d of March, 1886, an application was made to the probate, divorce, and admiralty division in the divorce suit by L. E. Stanhope, as the petitioner's next of kin and executor, for an order giving him leave to intervene and revive the suit for the purpose, among other things, of applying to the court to make absolute the decree nisi dissolving the marriage. The president, in delivering the opinion upon this application, said: "I am of opinion that this application must be refused. The case is, in my judgment, determined by *Grant v. Grant*, which decides that in the case of the death of the petitioner after the decree nisi, or before the decree absolute, the suit has abated, and the court cannot make that decree absolute. It has been sought to distinguish the present case from that, upon the ground that no application to intervene was there made by the legal personal representative of the deceased petitioner, by whom the application is here made. But the matter is a purely personal one. The question whether a man's marriage shall or shall not be dissolved is personal to himself, and no one can be put in his place to determine that which it was for him alone to determine. . . . If a person dies between the date of the decree nisi and the decree absolute, the matter which the petitioner has set in motion for the purpose, as it would appear, of getting the marriage dissolved, comes to an end; and it is useless, for death has dissolved that which he was seeking to have dissolved by law." L. E. Stanhope appealed, and the case was argued in the court of appeals before Cotton, Bowen, and Fry, L. JJ., each of whom delivered an opinion. Cotton, L. J., after stating the facts, said: "The court has to consider what is the exact position of the suitor under such circumstances. It is true that after a decree nisi has been made, neither the husband nor the wife can do anything more in the suit, except to apply to have the decree made absolute, but they may so act as to preclude them from having the decree made absolute; but the suit is not yet at an end, and the marriage is not yet dissolved. As this court held in *Ellis v. Ellis*, L. R. 8 P. D. 188, S. C., 49 L. T., N. S., 223, the *lis* is still pending, though neither party can take any steps in it, except as I have stated. And so far, this is in the appellant's favor. That there is no dissolution of the marriage until the decree has been made absolute, is shown by the form of the decree absolute. That decree puts an end to the marriage, and till then there is no dissolution. There is no rule directly authorizing the revivor of a divorce suit after the death of either husband or wife, and *Grant v. Grant* (the only authority on the point), is against the existence of such a right. What is the nature of revivor? It was a thing practiced in the court of chancery, and also by writ of error or suggestion on the record at common law. But revivor took place on the death of a plaintiff who was seeking to enforce some right which, on his death, would descend to and vest in his heir or his personal representative, when, if the transmission of interest had taken place before the commencement of the suit, the person to whom it was transmitted could himself have sued in respect of it. But in the case of a husband or wife seeking a dissolution of marriage, such a transmission of interest is impossible. It would be idle, after the death of a husband or wife, for the survivor to institute proceedings for a dissolution of the marriage, and it would be impossible for the personal representative of the one who had died to proceed against the survivor for a dissolution, for the marriage is already put an end to by the death. . . . I am of opinion that the present case does not come within the principle of revivor, for the only object of the suit being the dissolution

of the marriage, there was no right which devolved on any one when the husband was dead. Mr. Deane says that the cause of action is still continuing. It is true that the fact of adultery is not done away with, but is there any one now in existence who can take advantage of the fact? When it is said that a cause of action is continuing, it is meant that it has devolved on some person who can take advantage of it, and who has the same right which the other person had; but in cases coming within the maxim, *Actio personalis moritur cum persona*, no one can take advantage of the action begun by the deceased person. In my opinion, the case does not come within any principle on which the court would be justified in allowing any revivor or continuance of the suit." In reply to the suggestion of counsel that, even if no right of revivor existed, leave ought to be given to the executor to apply to have the decree *nisi* made absolute, the learned judge said: "In my opinion, the court cannot allow the application to be made by the petitioner's personal representative." And in answer to the suggestion that the decree might affect the title to the petitioner's personal property, he said: "No doubt it might. The obtaining of a decree absolute might in every case affect the right of the children of the marriage to obtain an alteration of the provision of a marriage settlement. But the object of a divorce suit is not to obtain any alteration of rights of property by the decree, though the result may be to alter such rights." Bowen, L. J., said: "I am of opinion that a man can no more be divorced after he is dead than he can be married or condemned to death. Marriage is a union for two lives, which can be dissolved either by death or by process of law; but after it has been dissolved in one of those ways you cannot dissolve it again; you cannot untie a knot which has been already untied." And Fry, L. J., said: "It is physically and logically impossible for any decree to dissolve a tie which is already dissolved by nature, — by the act of God." The appeal was dismissed. We have been unable to find any case where it was sought, as in the principal case, to prosecute a divorce suit to a final decree on behalf of a party after his death. But of course the reasons given for denying the application made in the case of *Stanhope v. Stanhope*, *supra*, would apply with still greater force in a case where no decree *nisi* had been made prior to the death of the party. It is not likely that any court will ever grant such a motion as that filed in the principal case.

But where a decree of divorce, which affects the property rights of the parties, has been made during the lifetime of both, it seems that the validity of such decree may be determined, notwithstanding the death of one of them; and the decree may be reviewed on writ of error: *Israel v. Arthur*, 6 Col. 85. Beck, J., delivering the opinion of the court in that case, said: "When it is considered that the decree in this case, as in other cases, affects the property rights of the parties as well as their marital rights, it would seem that the same reasons exist for determining its validity as in civil cases generally, notwithstanding the death of one of the parties, and regardless of the fact that the primary relief sought by the bill and afforded by the decree has been confirmed by death, whose decree is irrevocable." And in *Ling v. Ling*, 4 Swab. & T. 99, where a decree absolute had been made before the husband's death, the court made an order varying the trusts of a marriage settlement, on the petition of the guardian of the children of the marriage after the death of the plaintiff. But in *Baugh v. Baugh*, 37 Mich. 59, S. O., 26 Am. Rep. 495, it was held that the infant children of divorced parents cannot maintain a bill to set aside the decree of divorce. In that case a bill was filed by four infants of tender years by a next friend, to vacate a decree of divorce granted to their mother against their father. The ground of interference was

alleged collusion between their father and mother. The court below dismissed the bill, and the supreme court affirmed the decision. Campbell, J., delivering the opinion of the court, said: "The jurisdiction over divorce is purely statutory, and the legislative authority has not seen fit to allow any but the parties to intervene in such suits. The husband and wife are the only persons recognized as parties."

DIVORCE AT INSTANCE OF THIRD PARTY.—It is now established by the weight of authority, both in this country and in England, that a suit for divorce may be prosecuted by or against the guardian or committee of an insane person, where the act for which the divorce is sought was committed by the defendant before he or she became insane: *Mordaunt v. Moncreiffe*, L. R. 2 S. & D. App. Cas. 374; *Baker v. Baker*, L. R. 5 P. D. 142, on appeal 6 Id. 12; *Parnell v. Parnell*, 2 Hagg. Const. 169; *Mansfield v. Mansfield*, 13 Mass. 412; *Denny v. Denny*, 8 Allen, 311; *Garnett v. Garnett*, 114 Mass. 379; S. C., 19 Am. Rep. 369; *Cowan v. Cowan*, 139 Id. 377; *Rathbun v. Rathbun*, 40 How. Pr. 328; *contra*: *Worthy v. Worthy*, 36 Ga. 45; *Birdsell v. Birdsell*, 33 Kan. 433; S. C., 52 Am. Rep. 539. In the case of *Mordaunt v. Moncreiffe*, *supra*, the petition for a divorce against the wife was met by an allegation that she was insane and unable to defend herself. The court below appointed a guardian *ad litem* for her. Upon a verdict of her insanity, the proceeding was suspended, but with liberty to the husband to apply again to the court in the event of her recovery. The husband thereupon appealed to the House of Lords, insisting that the wife's insanity ought not to bar or impede the investigation of the charge of adultery brought against her. The House of Lords adopted this view, reversed the order appealed from, and sent the case back with directions to proceed. Of the judges who were consulted, Denman, J., Kelly, C. B., and Pollock, B., concurred in holding that a divorce may be asked and decreed on behalf of or against a lunatic, the court appointing a guardian *ad litem* for protection; while Keating and Brett, JJ., gave it as their opinion that the insanity of either husband or wife is an absolute bar to a divorce. In Massachusetts it is held that the court has authority to entertain a petition filed by a third person, representing that a libelant for a divorce is insane; and if such insanity is established, the court will appoint a guardian *ad litem* to conduct the cause for the libelant: *Broadstreet v. Broadstreet*, 7 Mass. 474; *Denny v. Denny*, 8 Allen, 311. But where it appears during the proceeding by a wife against her husband for a divorce on the ground of adultery, that he has become insane since the fact charged, the court will proceed no further, until a guardian *ad litem* has been appointed on his behalf: *Mansfield v. Mansfield*, 13 Mass. 412. A libel for divorce can not be filed by a guardian of a spendthrift, appointed to act as such, but the spendthrift must file his bill in his own name: *Winslow v. Winslow*, 7 Id. 96. In Kansas the guardian of an insane woman cannot maintain an action against her husband for divorce or alimony: *Birdsell v. Birdsell*, 33 Kan. 433; S. C., 52 Am. Rep. 539. Nor can such an action be maintained in Georgia: *Worthy v. Worthy*, 36 Ga. 45. In that case Harris, J., delivering the opinion of the court, said: "We are unable to regard the right to sue for a divorce in any other light than as strictly personal to the party aggrieved. . . . No divorce can or ought to be had in this or any case, but through the agency and will of the injured wife."

In *Bradford v. Abent*, 89 Ill. 78, it was held that where a bill is filed in the name of an insane wife, against her husband, for a divorce, while she is in close confinement in another state, beyond the jurisdiction of the court, it matters not who advised the filing of the bill. She can give no consent to

the proceedings, and everything done in her name, and the alleged decree of divorce will be invalid, and may be set aside on bill filed by her conservator. And that whether there is fraud in fact or not, the law will presume fraud from the unequal position of the parties, and that will vitiate the decree. In *Newcomb v. Newcomb*, 13 Bush, 544, the court held that a husband cannot sue his wife for divorce as a non-resident or absent defendant, when she is absent from the state in obedience to his will, or is confined by him in an asylum, or other place with no power to return or respond to a summons or order of warning.

EASTMAN v. AMOSKEAG MANUFACTURING COMPANY.

[44 NEW HAMPSHIRE, 148.]

ADMISSION OF TESTIMONY WHICH IS INCOMPETENT AS CASE THEN STANDS, but which is afterwards made competent by the introduction of other evidence, is not a ground for setting aside the verdict.

ADMISSION OF INDEPENDENT FACT, MADE DURING NEGOTIATIONS FOR COMPROMISE OF CONTROVERSY, is admissible in evidence against the party making it. And the fact thus admitted need not be independent of the subject-matter of the controversy, provided it be a distinct admission of a fact, as distinguished from an offer to buy peace, or compromise a controversy.

SLIGHT SECONDARY EVIDENCE OF CONTENTS OF PAPER IS SUFFICIENT against a party who has the power to remove all doubts by producing the original, but refuses to do so after proper notice.

RULES OF COURT MAY, IN PROPER CASE, BE SUSPENDED BY JUDGE PRESIDING AT TRIAL, in the exercise of his discretion.

THAT WITNESS MAY BE UNABLE TO TESTIFY WITHOUT IMPLIED EXPRESSION OF OPINION is no objection to his testimony upon questions relating to heights and distances, and as to the number, quantity, and dimensions of things.

QUESTION IS PROPERLY EXCLUDED WHEN ANSWER TO IT COULD NOT HAVE BEEN MATERIAL.

ONE WHO ERECTS AND STILL CONTINUES NUISANCE IS NOT ENTITLED TO NOTICE before suit, although the premises claimed to be injured by the nuisance have been conveyed. But he who erects a nuisance does not, by conveying the land to another, transfer the liability to the grantee, and the latter is not liable until, upon request, he refuses to remove the nuisance.

WHERE JURY GIVES MORE THAN NOMINAL DAMAGES, all instructions given in reference to nominal damages become immaterial, because no state of facts arose to which such instructions could apply. And the same is true in relation to instructions sought upon the assumption that no actual damage was done.

NOT AUTHORIZING PERSON TO BUILD DAM ON HIS OWN LAND upon a river which is a highway, merely protects him from an indictment for a nuisance in obstructing the river; but if in building his dam he overflows his neighbor's land, he is still liable to an action therefor.

CASE, for flowing the plaintiff's land on the Merrimack River, between July 3, 1856, and October 21, 1859, by means of the

defendants' dam and flash-boards, at Amoskeag Falls, below said land, thereby washing away the soil. The plaintiffs alleged seisin in the right of the wife. The plaintiffs failing at first to prove their deed, began by introducing evidence tending to show possession of the premises from the summer of 1856. They then offered evidence tending to show the condition of the stream for several years prior to the commencement of the possession shown, and extending back to a time when the witness testified the dam did not extend entirely across the river. The defendants objected on the ground that it was prior to the plaintiffs' possession, but the court admitted the evidence. One Farmer, owning land on the river opposite the plaintiffs', testified to a settlement with the company in August, 1855, in the course of which he stated that the defendants' agent admitted they flowed his land. On cross-examination, it appeared that the settlement resulted in the purchase of a right to raise the defendants' stone dam two feet higher, and was reduced to writing. On defendants' motion, the court ruled out so much of Farmer's evidence as stated the contract, but ruled that the admission of the particular fact was competent. One Shirley, owning land on the river, about five miles above the plaintiffs', testified that in 1858 the defendants' agent was on his land and he pointed out to the agent the damage done to the land by the water; and that subsequently the agent paid him "for something done by water" in 1858, and he gave the defendants a receipt. After proof of notice to the defendants to produce this receipt, the witness said he had a copy of the receipt, and produced it. On cross-examination, he said the copy was not made by him or in his presence, or compared by him with the original, but that he was able to state as to its correctness, "for he looked pretty sharp at the receipt when he gave it." The defendants objected that this copy was not sufficiently proved, but the court admitted it. It acknowledged the receipt of one hundred dollars in full for claim of damage by flowage over the farm in Hooksett, owned by Shirley, in consequence of flash-boards kept on the company's dam in Manchester. One Partridge, owning land on the river above the dam, testified that defendants' agent, Straw, said to him that the company did not claim any right to have the flash-boards on, and that they were willing to pay all damage that had been done to him by that cause, and that Straw then settled with and paid him. The defendants subsequently introduced evidence tend-

ing to show that the settlements with these two witnesses were compromises, and the court charged the jury that if they found these settlements to be compromises, they were not to be considered as evidence against the defendants; but if they found any independent admissions of a fact made during such compromise by the defendants' agent, such admission would be evidence against the defendants. The plaintiffs called two counselors of the court not apparently engaged in the active conduct of the cause before the jury, who were the subscribing witnesses to the deed under which the plaintiffs claimed. They had for several terms been retained, and were counsel for the defendants, and their names appeared as such on the printed docket, and they had not been summoned before the commencement of the term. For this reason they declined to testify. The plaintiffs then moved the court to suspend the rule of court in its application to the case of these counsellors. The court deeming such suspension, upon the facts appearing and the evidence offered by the plaintiffs, to be within the discretion of the court, and deeming the case to be a proper one for the exercise of such discretion, ordered that unless the defendants would admit the formal execution of the deed, the rule should be so suspended, upon condition that the plaintiffs should call such counselors only to the formal execution of the deed. To this the plaintiffs consented, and the defendants declining to admit the formal execution of the deed, the court compelled the counselors to testify. The deed which conveyed the premises to the female plaintiff was then put in. Straw, the defendants' agent, testified that he had made for the defendants various arrangements with riparian proprietors above the dam as to water-rights, and that these arrangements were all in writing. The defendants then proposed to ask him the question referred to in the opinion as having been properly excluded, and which was in the following words: "State from what persons in possession of land on the Merrimack River, between Amoskeag Falls and Hooksett Falls, the defendants have not acquired the right to raise their stone dam, permanently, two feet above the top of their present stone dam." The instruction in regard to the reasonable use of the stream referred to in the opinion, was as follows: That although the defendants actually and perceptibly raised the water on the plaintiffs' land in the channel of the stream, if they so raised it merely within the banks of the river, and did no actual damage,

they were not liable, if under all the circumstances the jury found that they only made a reasonable use of the stream. In reference to the acts of the legislature introduced in evidence, and which are referred to in the opinion, the court instructed the jury that these acts did not, as against the plaintiffs, give the defendants the right to raise the water on the plaintiffs' land actually and perceptibly above the natural flow of the stream. The jury found for the plaintiffs and the defendants moved to set aside the verdict, and for a new trial. Other facts are stated in the opinion.

S. N. Bell, H. Foster, W. C. and S. G. Clarke, and Morrison and Stanley, for the defendants.

H. F. French, Cross and Topliff, and Tappan, for the plaintiffs.

By Court, SARGENT, J. It becomes immaterial to consider whether the evidence concerning the state and condition of the stream before the plaintiffs' possession commenced would have been competent had no other title but possession been introduced; because it was afterward made competent by the introduction of the plaintiffs' deed, which showed not only the extent of the possession, but of the right. And were we satisfied that this evidence was incompetent at the time it was introduced, and as the case then stood, concerning which we express no opinion, yet, where the plaintiffs, by the next piece of evidence,—their deed,—make the evidence objected to clearly competent, we should not set aside the verdict: 1. Because the court may have admitted the evidence, with the expectation that it would in that way be rendered competent by the subsequent evidence; and 2. Because, however that may have been, we can see clearly that the defendants have not been injured by the ruling.

The objection to the testimony of Farmer is not well founded. Whatever was done or said between him and the company, by way of compromising any controversy between them, was incompetent; but the fact which he says the defendants' agent admitted to him, namely, that the defendants flowed his land, we think was competent. His land was on the opposite side of the river from the plaintiffs' land, and from its location, and the other evidence which we may presume was before the jury in relation to its situation and elevation, as compared with the plaintiffs' land, we think the fact, if established, that the defendants flowed Farmer's land, would be competent, upon the

question whether they flowed the plaintiffs' land, which was a material point in the issue.

As to the testimony of Shirley, about his settlement and his receipt, and the testimony of Partridge concerning his settlement, the instructions of the court were also correct. It is not necessary that the fact admitted should be independent of the subject-matter embraced in the compromise; but it must be an admission of a fact, relevant to the present issue, as distinguished from an offer to buy peace, or compromise a controversy: *Sanborn v. Neilson*, 4 N. H. 501; *Downer v. Button*, 26 Id. 338; and that it was proper to submit the whole transactions and conversations to the jury, with such instructions as were here given, is settled in *Bartlett v. Hoyt*, 83 Id. 151.

The copy of the receipt was properly admitted. There is no doubt that the witness, in a case like this, where secondary evidence was admissible, might have stated the contents of the receipt from recollection, had he been able to do so, if he had had no copy. He swears that the paper produced is a copy; and though, on cross-examination, he says he did not make it himself, nor was it made from the original in his presence, or compared by him with the original, he still asserts that it is a true copy, and gives the reason why he is able thus to state. The witness was not asked if he recollected the contents of the receipt, and could state them; but he was asked whether a certain paper presented to him was a copy of the receipt, and if he could swear, as he did, that it was a copy, both on direct and cross examination, we think sufficient *prima facie* to make the copy admissible, in a case like this, where the defendants had the original in their possession, and refused to produce it on notice. In such a case, slight evidence of the contents of the paper is sufficient against the party who might remove all doubt by producing the original: *Foye v. Leighton*, 24 N. H. 41 [53 Am. Dec. 231], and cases cited. The witness testified that he knew it was a copy, which made it competent evidence to go to the jury; and the defendants had it in their power to show whether the witness was mistaken or not, and did not choose to do so. They cannot complain: *Bassett v. Salisbury Co.*, 28 Id. 452.

The suspension of the thirty-sixth rule of court was a matter within the discretion of the court: *Deming v. Foster*, 42 N. H. 165, 178. We see no reason for revising the ruling of the court in the present case (if we would do it in any case), when we consider the circumstances and the condition upon which the ruling was made.

We think the evidence in relation to the Lowell dam, thirty miles below the dam and land in controversy, and its effects on the stream and river banks in its neighborhood, was properly excluded, notwithstanding evidence of the same facts was afterward admitted without objection. It would only be raising a collateral issue, and would be undertaking to test the point in dispute by another equally doubtful, where all the facts alleged, if proved, would furnish no legal presumption as to the principal facts in dispute. It would, in truth, be raising a new issue, to be tried and decided, which the plaintiffs could not be expected and would not be required to be prepared to meet on this trial: *Collins v. Dorchester*, 8 Cush. 396; *Aldrich v. Pelham*, 1 Gray, 510; *Hubbard v. Concord*, 85 N. H. 59 [69 Am. Dec. 520].

The evidence tended to show that the defendants' dam raised the water in the river as far back as Hooksett Falls, and the defendants were claiming that they had acquired a right by prescription to raise and use the water, as they had raised and used it since the plaintiffs purchased their land. Now, in answer to that claim, the plaintiffs introduced witnesses owning land between the dam and Hooksett Falls, on the river, who were allowed to testify that the water had been higher for the five years past than at any time before; and in connection with that fact they were allowed to describe the changes in the banks on their lands, and on the plaintiffs' land, from washing, during the last five years, and also for the years previous, and stated the comparative extent of these changes in the different periods of time.

We do not consider this testimony objectionable, as calling for the opinion of the witnesses. They stated facts within their knowledge occurring in different periods of time; and they could well state whether the water had been higher or lower, or the banks had been washed more or less in one period than in the other, and about how much, more or less, as matters of facts, about which a witness may properly testify. In questions relating to heights and distances, and as to the number, quantity, and dimensions of things, a witness may not be able to testify without an implied expression of opinion; but that is no objection to the testimony upon such points and subjects: *Hackett v. B. C. & M. Railroad*, 35 N. H. 390; *Willis v. Quimby*, 31 Id. 485; *Hall v. Davis*, 36 Id. 569. And if the water had been higher on all their lands, and on the plaintiffs' land, and the banks had been washed more on

all these lands for the last five years than before, and the evidence tended to show that this rise of water and washing of the banks was caused by the defendants' dam and flashboards, we are at a loss to see why this evidence was not competent to rebut the evidence of a prescriptive right thus to flow, which right requires twenty years' user as a foundation on which to rest. This testimony was not introduced upon the question of damages, but upon the question of right. The plaintiff could only recover damages for injuries done after they owned the land.

There is no foundation for the exception to the testimony in relation to the building of a part of the dam in 1856, on the ground that "this structure was outside the original channel." That could make no difference; for if the defendants built and maintained a dam anywhere, which raised and kept the water on the plaintiffs' land higher than they had the right to do, it could make no difference whether it was in the original channel or out of it. The case finds that it was a part of the defendants' dam, and was erected where the water did run over in high water, and thus impeded and raised the water at a time when damages are usually done to land by flowage.

The question to Straw was properly excluded. When its particular form is examined, it will be seen that in order to answer it, Straw must decide upon the legal effect of all the written contracts he had taken from such riparian proprietors, in order to decide from how many he had, and from how many he had not, obtained such right; a responsibility which the law does not impose upon any witness, and which it will allow to be assumed by none. But even if the question had been so varied as not to be liable to that objection, it is difficult to see how it could be material. If he had obtained such rights, or deeds, or writings, purporting to convey them from all such proprietors except the plaintiffs, that would in no way affect the plaintiffs' right, or the defendants' liability for infringing them. If he had named several persons from whom he had not obtained such rights, and had not mentioned the plaintiffs among them, that fact would not have been competent to show that he had acquired any such right from the plaintiffs, because, from his own testimony, it appears that if he has any such grant it is in writing, and must be produced, as the best evidence of the fact. We do not see that the question could have been answered in any way which would have made the answer material.

Nor was it necessary that the plaintiffs should notify the defendants before they brought their suit. The doctrine of the cases in this state and elsewhere is, that he who erects a nuisance does not, by conveying the land to another, transfer the liability for the erection to the grantee; and the grantee is not liable until, upon request, he refuses to remove the nuisance, for the reason that he cannot know until such request but the dam was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable, notwithstanding his alienation: *Plumer v. Harper*, 3 N. H. 88 [14 Am. Dec. 333]; *Woodman v. Tufts*, 9 Id. 91; *Curtice v. Thompson*, 19 Id. 471; *Carleton v. Redington*, 21 Id. 291; *Snow v. Cowles*, 22 Id. 296; *Waggoner v. Jermaine*, 3 Denio, 301 [45 Am. Dec. 474]; *Johnson v. Lewis*, 13 Conn. 303 [83 Am. Dec. 405]; 1 Chit. Pl. 83.

In the case before us, the party erecting the dam and causing the nuisance, if there is any, still continues to maintain it. There has been no transfer of the dam, or the land on which it stands, nor any change of possession, since the dam was built. But the land claimed to be damaged by the flowage had changed hands, and the instructions of the court were that, upon certain conditions, the plaintiffs would be entitled to recover nominal damages, etc.; and in such a case, no notice from the plaintiffs was necessary, although this flowage was the same before as since the plaintiffs' deed.

By this ruling it may have been intended to be held that no notice in the particular case stated was necessary; that is, where only nominal damages were to be recovered; or it may have been intended to be held that no notice in any case was necessary, where the nuisance was continued by the same person who first erected it, although the premises claimed to be injured by the nuisance had been conveyed. We presume the latter was what was intended by the ruling, and that would include the former; and we think the ruling, in that view of it, correct.

In *Woodman v. Tufts*, 9 N. H. 91, after stating the doctrines applicable to notice, when the one who has erected the nuisance conveys it with the land on which it was located, it is said: "A similar reason for a request to abate a nuisance arises where the property affected by the nuisance has been aliened. If the grantor acquiesced in the act affecting the property, or made no complaint, the natural inference would seem to be that the grantee willingly took the property as he

found it, and it would be considered as an assent on his part, until request should be made that the nuisance be abated." In *Penruddock's Case*, 5 Coke, 100, it is said: "If the house affected by the nuisance be aliened, the alienee, after request made to remove or abate the nuisance, may maintain an action for the nuisance."

But such is not the law. The reasons there given for the position are unsatisfactory, and the authority which is cited in support of it does not sustain it.

The party who has erected a dam and flowed my land without right, is liable to me for the damages; and if I sell the land, and he continues to flow it by maintaining the same dam, he does not need any notice of the change of title or of possession. He is presumed to know, and to intend the natural consequences of his acts, and is liable for the injury he does, which is no more or less to my grantee than it would have been to me, unless he wishes to use the land for some different purpose. The party who originated the injury, and continues it, cannot ask for any notice to make him aware of his liability. He knows that as well as he did while I owned the land, or as he would if I had not sold it. Suppose, as is assumed, that I had never objected, but had allowed the nuisance in silence for one year, or three years, I should then have the right to object, and to bring my suit for damages, and that without any notice; and why should my grantee be required to give notice in such a case more than I? But suppose I had objected from the first, and had brought a suit and recovered judgment for damages, and then sold the land. There, the reason for the rule laid down in *Woodman v. Tufts*, 9 N. H. 91, would be entirely removed, but the rule, as there stated, would remain, and must be applied alike in all cases, whether with reason or against reason.

But again: admitting the doctrine to be correct that a vendee of land, injured by a nuisance, must give notice to the person erecting and continuing the nuisance, before he can maintain his action, then, during the time when he is thus without remedy, the statute of limitations would not run against him, and such time must be deducted from the whole time in ascertaining the twenty years of prescription; and if he should never give the notice, he would never be entitled to his remedy, and the defendant could never acquire the right to flow the land by prescription. The defendants in this case would hardly assent to that doctrine probably. But it may

be said that the party injured should be required to give his notice in reasonable time, and that only such reasonable time should be deducted from the whole time in fixing the time of prescription. But various difficulties might present themselves to any such holding, which we need not now stop to consider. The defendants would hardly be willing to adopt that doctrine, at least if making such a deduction was to defeat a prescriptive right which they would otherwise be able to establish; and with reason, because we think they might properly claim that if they had flowed the land now owned by the plaintiffs, just as they now do, for twenty years and more, before this suit was commenced openly, visibly, without interruption, and adversely to every one claiming the land during that time, the right had been gained. Nor would it make any difference in regard to the user being adverse, whether the man who originally owned the land that was injured had continued to own during all the twenty years, or whether the land had changed hands every year during that time.

No such objections arise to the notice to the vendee of the land on which the nuisance is located, because it is there held that the owner of the land injured has his remedy all the time against some one. If he cannot sue the vendee of the nuisance without notice, he can the vendor, even after he has aliened the nuisance; and after notice to the vendee, he may sue either at his election.

I find the precise expression which is used in *Woodman v. Tufts*, 9 N. H. 91, as being from *Penruddock's Case*, in 12 Petersdorff's Abridgment, 798, 799, note, with a reference to the same authority, but the case itself authorizes no such conclusion. *Penruddock's Case*, 5 Coke, 101, was a *quod permittat prosternere*, between Clark, plaintiff, and Penruddock and wife, defendants. The case was this: John Cock built a house on his land, so near the curtilage of Thomas Chichley that his house did overhang the curtilage of said Chichley three feet. Cock then conveyed his house to Penruddock and his wife, and Chichley, to whom the nuisance was done, conveyed his house to Clark, the plaintiff. It was objected by the defendant that if the tenant to whom the wrong is done, enfeoffs another, his feoffee shall never avoid this wrong, for he shall take the land in the same plight as it was given him. Wherefore it was contended that the feoffee should not have the said *quod permittat* to avoid the wrong and nuisance made in the time of his feoffor.

But it was resolved that the dropping of the water, in the time of the feoffee, is a new wrong, so that the permission of the wrong, by the feoffor, or his feoffee, to continue, to the prejudice of another, shall be punished by the feoffee of the house to which the injury was done; and if it be not reformed, after request made, the *quod permittat* lies against the feoffee, etc. But without request made, it doth not lie against the feoffee; but against him who did the wrong it lies without any request made, for the law doth not require any request to be made to him who doth the wrong himself.

So that *Penruddock's Case*, 5 Coke, 100, instead of being an authority that the feoffee of the house injured could not maintain the writ of *quod permittat* at all, without notice, is a direct authority that such feoffee may maintain the action against the party doing the original wrong, and continuing it, without any notice; and that the notice, in that case, was required, not because the plaintiff was the feoffee of the premises injured, but because the defendant was the feoffee of the premises containing the nuisance. This case is stated briefly by Richardson, C. J., in *Plumer v. Harper*, 3 N. H. 91 [14 Am. Dec. 833], and by Savage, C. J., much more fully, in *Blunt v. Aikin*, 15 Wend. 523 [30 Am. Dec. 72]; and again by Jewett, J., in *Waggoner v. Jermaine*, 3 Denio, 309 [45 Am. Dec. 474]; and in all, the doctrine of that case is approved. I find the same doctrine held in *Westbourne v. Mordant*, Cro. Eliz. 191; in *Bee-
wick v. Cunden Hill*, Id. 402; *Some v. Barwish*, Cro. Jac. 231; and in *Brent v. Haddon*, Id. 555, where a request was made to the lessee of the party erecting the nuisance.

In *Curtice v. Thompson*, 19 N. H. 471, the true principle is stated, where it is said, in speaking of the defendants "as the authors of the nuisance, then, they have no right to any notice. They are liable upon the evidence which charges them with having caused the nuisance; notice being required only to charge a purchaser by reason of having adopted it." So in *Johnson v. Lewis*, 13 Conn. 303 [33 Am. Dec. 405], the plaintiff was the feoffee of land injured, and the defendant was feoffee of the land containing the nuisance, and held that notice was necessary before suit, not because of the plaintiff's position, but because the defendant was purchaser of the land containing the nuisance. And it is said that otherwise the purchaser of such property might be subjected to great injustice, if he were made responsible for consequences of which he might be ignorant, and for damages which he never intended to occa-

sion. *Branch v. Doane*, 17 Conn. 402, 418, is also a case in point. So in *Hatch v. Dwight*, 17 Mass. 289 [9 Am. Dec. 145], it is held that the right of a mortgagee to commence an action in such a case exists as soon as he takes possession of the mortgaged premises.

The party obstructing a watercourse, so that it overflows the plaintiff's land, is not exonerated by conveying the land to another, nor is he entitled to notice to abate before action brought: 1 Hill on Torts, 710; Angell on Watercourses, sec. 403; *Wason v. Sanborn*, 45 N. H. 169.

The other portion of these instructions, that the defendants were liable in nominal damages, if they had, by their dam and flash-boards, raised the water on the plaintiffs' land, actually and perceptibly higher than they had the right to do, is in accordance with numerous decisions in this state and elsewhere: *Snow v. Cowles*, 22 N. H. 296, 302; *Woodman v. Tufts*, 9 Id. 91; *Bassett v. Salisbury Mfg. Co.*, 28 Id. 452; *Tillotson v. Smith*, 32 Id. 90, 96 [64 Am. Dec. 355], and cases cited; *Branch v. Doane*, 18 Conn. 233. But it becomes unnecessary here to express any opinion upon the question thus raised, or upon the authorities thus cited, as the jury gave damages in the sum of two hundred dollars, which is more than nominal, and shows that the jury found the plaintiffs' land had been actually and substantially and wrongfully damaged by the defendants. No state of facts arose to which the instructions could apply, and they therefore became immaterial.

The same is true in relation to the instructions, which the court declined to give, in regard to the reasonable use of the stream by the defendants; for those instructions were sought and predicated upon the assumption that no actual damage was done. Upon the finding of the jury, those instructions also became immaterial.

The act of the legislature, passed July 3, 1861, by its own limitations has no application to this suit. The other acts referred to authorize the purchase of lands about Amoskeag Falls, and the erection of a dam there across the Merrimack River, with other works, buildings, and machinery, for the purposes of carrying on the manufacturing business in various departments. But none of these acts, in terms, gave the company any right to take the lands of others for their use; nor do they provide for any compensation for land so taken; and without the latter provision, any authority to take lands,

either express or implied, in their charter, or any act of the legislature, would be unconstitutional and void. But these acts simply give the company the right to build a dam and mills of various kinds for the company's own use. But an act authorizing one to build a dam on his own land, upon a river which is a highway, merely protects him from an indictment for a nuisance in obstructing the river; but if in doing this he overflows his neighbor's land, he is liable to an action therefor: *Thatcher v. Dartmouth Bridge*, 18 Pick. 501; *Crittenden v. Wilson*, 5 Cow. 165 [15 Am. Dec. 462]; *Gardner v. Newburgh*, 2 Johns. Ch. 162; Angell on Watercourses, sec. 476.

The ruling on this point was correct. There must, therefore, be judgment on the verdict.

ADMISSION OF COMPETENT EVIDENCE OUT OF ITS ORDER IS NO GROUND FOR NEW TRIAL: *Robinson v. Blakely*, 55 Am. Dec. 703, note 705; *Commonwealth v. Eastman*, 48 Id. 596. It is not error to admit evidence which may be made competent by the introduction of subsequent testimony: *Atwell v. Miller*, 61 Id. 294, note 299; *Hamilton v. Summers*, 54 Id. 509.

STATEMENTS OF FACTS MADE IN NEGOTIATIONS FOR COMPROMISES are admissible in evidence: *Evans v. Smith*, 17 Am. Dec. 74.

SECONDARY EVIDENCE, WHEN ADMISSIBLE: See *Morrison v. Whiteside*, 79 Am. Dec. 661, note 665, where other cases are collected; *Lipcomb v. Postell*, 77 Id. 651, note 658; *Bell v. Byerson*, Id. 142, note 145.

OPINION OF WITNESS, WHEN ADMISSIBLE IN EVIDENCE: See *Chicago etc. R. R. Co. v. George*, 71 Am. Dec. 239, note 244; *Atlantic etc. R. R. Co. v. Campbell*, 64 Id. 607, note 609; *Parker v. Misc*, 62 Id. 776, note 778; *Nelms v. State*, 53 Id. 94, note 101, where other cases are collected.

LIABILITY OF ERRITOR OF NUTRANCE: See *Pillsbury v. Moore*, 69 Am. Dec. 81, note 94, where other cases are collected; *Cromwell v. Cox*, 68 Id. 120, note 123.

INSTRUCTIONS ON MATTERS IMMATERIAL to issue, though wrong, are of no avail to a party excepting: *Whidden v. Seelye*, 63 Am. Dec. 661, note 665, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Bennett v. Ford*, 47 Ind. 271, to the point that a party is not liable in damages for an injury purely accidental.

MORGAN v. DODGE.

[44 NEW HAMPSHIRE, 265.]

COURT OF PROBATE HAS POWER, INDEPENDENT OF STATUTE, TO REVOKE LETTERS TESTAMENTARY or of administration, where they have been issued without jurisdiction, irregularly or illegally, or for a special cause which has ceased to exist.

ADMINISTRATION OF ESTATE IS SUSPENDED UNTIL PERSON APPOINTED EX-ECUTOR FILES PROPER BOND, and the claims of creditors are not barred

by failure to present them, or to commence suit upon them, while such suspension continues.

WHERE RESIDUARY LEGACY IS OF PERSONAL PROPERTY ONLY, and it appears that there is no other property undisposed of, a bond may be given by the executor to pay debts and legacies; and in such a case, extrinsic evidence of the condition of the estate may be received in order to determine whether or not the legacy is residuary.

APPLICATION OF WIDOW FOR LETTERS TESTAMENTARY IS SUFFICIENT WRITING to inform the judge of her acceptance of the will, if nothing in it indicate the contrary.

APPEAL from a decree of the court of probate declaring void the appellant's appointment as executrix of the will of her late husband, and revoking her letters testamentary. The appellee alleged that he was a creditor of the estate of William Morgan, deceased. The other facts are stated in the opinion.

S. M. Wilcox, for the appellant.

F. O. French, for the appellee.

By Court, *BELL, C. J.* It is contended that if administration is granted improperly, the only remedy is by appeal; but the law cannot be laid down so broadly. A judgment of the court of probate upon any matter within its jurisdiction, not appealed from, is conclusive to the same extent as a judgment of a court of common law: *Bryant v. Allen*, 6 N. H. 116; *Ham v. Ayers*, 22 Id. 423; *Tebbets v. Tilton*, 24 Id. 120; *Merriell v. Harris*, 26 Id. 142 [57 Am. Dec. 359].

A grant of letters testamentary, or of letters of administration, follows a decision of the court upon the matters alleged in the petition upon which the proceedings are founded, and the matters relied upon in answer to the petition. Such decision is binding and conclusive upon the parties to the proceeding and their privies, that is, upon all who appear and take part in the proceeding, and upon all who were duly notified and had a right to be heard and to take an appeal, as to all matters directly in issue upon the hearing: *King v. Chase*, 15 N. H. 9; while they are not concluded as to any matter not in issue, or not necessarily involved in the proceeding, or as to any matter of which they could not avail themselves; because it did not then exist, or was unknown to the parties interested: *Wilson v. Edmonds*, 24 Id. 517.

In this state, courts of probate are courts of record: *Tebbets v. Tilton*, 24 N. H. 120. They exercise many powers solely by virtue of the provisions of our statutes; but they have a very extensive jurisdiction not conferred by statute, but by a

general reference to the existing law of the land, that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law: *Kimball v. Fisk*, 39 Id. 120 [75 Am. Dec. 213]. An unusual number of the most necessary and useful rules of the common law in relation to the estates of persons deceased have been embodied in our statutes; but by no means the main body of the common law on this subject. And the courts of probate have an extensive jurisdiction of which the statutes take no particular notice. This jurisdiction is conferred and recognized by the constitution (pt. 2, sec. 80), and by the Revised Statutes, c. 152, sec. 3, which provide that every judge of probate within his county has jurisdiction of the probate of wills and of granting administration, and of all matters and things of probate jurisdiction relating to the sale, settlement, and final distribution of the estates of deceased persons.

The supreme court has no original jurisdiction, though it is the court of appeal in probate matters, so that all the authority known to our laws in relation to the subject in question belongs, in the first instance, to the courts of probate, perhaps with the exception of some cases of equitable jurisdiction.

By the Revised Statutes, c. 158, sec. 10, it is provided that "if any executor or administrator, by reason of absence, or any infirmity of body or mind, or by wasteful or fraudulent management in his trust, shall become unfit for the discharge thereof, or unsafe to be trusted therewith, the judge of probate, upon due notice given, may revoke such administration"; and by section 11, "such trust may be revoked under any circumstances with the consent of the executor or administrator, when it shall appear to the judge to be proper." These provisions have no application to the present case, and as there is no inconsistency between them and the common law relative to other cases of revocation, no repeal of the common law can be implied: *State v. Wilson*, 43 N. H. 415.

It is settled by the authorities that at common law the grant of letters testamentary and of letters of administration may be revoked, either upon appeal or by a suit upon a citation: 2 Bac. Abr., tit. Executors, E, 12; 1 Williams on Executors, 463; Toller on Executors, b. 1, c. 2, sec. 8.

And there are many cases where the courts of probate may remove such executors or administrators, besides those enumerated in the statute; and in these enumerated cases it is believed they had the same power at common law which the

statute aims to confer: *Offley v. Best*, 1 Sid. 373; *Pries v. Parker*, 1 Lev. 158; *Thomas v. Butler*, Vent. 219; *Dubois v. Trant*, 12 Mod. 438; *Hills v. Mills*, Salk. 36; *Goods of Jenkins*, 8 Phill. 33; 1 Com. Dig., tit. Administrator, B, 8; 4 Burns's Eccl. Law, 292; Bac. Abr., tit. Executors, E, 12; 1 Williams on Executors, 481.

These cases fall into three classes: first, where the probate court has no jurisdiction, and consequently its proceedings are absolutely void: *State v. Richmond*, 26 N. H. 239; *Tebbetts v. Tilton*, 31 Id. 273; *Sigourney v. Sibley*, 21 Pick. 101 [32 Am. Dec. 248]; S. C., 22 Id. 507 [33 Am. Dec. 762]; but where it is nevertheless proper that the probate or letters of administration should be revoked before a new appointment is made, to prevent abuses and preserve order in the records: Toller on Executors, 75, 126; *Allens v. Andrews*, Cro. Eliz. 283; *Rains v. Com. of Canterbury*, 7 Mod. 146; *Pratt v. Stocke*, Cro. Eliz. 315; *Loton v. Loton*, 1 Hagg. Ecc. 683; 1 Williams on Executors, 478; though it was formerly held otherwise: *Newman v. Beaumont*, Owen, 50; 4 Burns's Eccl. Law, 293; Godolph. Orp. Leg., pt. 2, c. 81, sec. 4.

Of this class are the cases where the deceased was not "last an inhabitant of the county" in and for which the court is held, or if not being last an inhabitant of this state, he had no estate in the county: R. S., c. 152, sec. 7; *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20 [16 Am. Dec. 372]; *Wilson v. Frazier*, 2 Humph. 80; *Johnson v. Corpenning*, 4 Ired. Eq. 216 [44 Am. Dec. 106]; 1 Williams on Executors, 478.

Analogous cases in England would be the grant of letters testamentary, or of administration, by a bishop, where there were *bona notabilia*, or by an archbishop where there were none: Com. Dig., tit. Administrators, B, 8; *Ravenscroft v. Ravenscroft*, 1 Lev. 305; 1 Williams on Executors, 478; *Allens v. Andrews*, Cro. Eliz. 283; *Blackborough v. Davis*, 1 Salk. 38.

Or where the judge is interested as heir or legatee, executor or administrator, or as guardian or trustee of any person: R. S., c. 152, sec. 10; *Cottle, Appellant*, 5 Pick. 483; *Coffin v. Cottle*, 9 Id. 287; *Sigourney v. Sibley*, 21 Id. 101 [32 Am. Dec. 248]; S. C., 22 Id. 507 [33 Am. Dec. 762].

So, where a will is proved, or letters of administration are granted, where the person supposed to be dead is still living, the powers of the court being limited to the estates of deceased persons: R. S., c. 152, sec. 3; *Hooper v. Stuart*, 25 Ala. 408; *Goods of Napier*, 1 Phill. 83.

Of the second class are the cases where the judge of probate has jurisdiction, but by mistake or otherwise the probate or letters of administration are issued irregularly or illegally. In these cases, the proceedings are not void, though they may be avoided and the letters revoked: *Kittredge v. Folsom*, 8 N. H. 109; Com. Dig., tit. Administrators, B, 9; *Blackborough v. Davis*, 1 Salk. 88; *Syms v. Sym*, T. Raym. 224; *Semine v. Semine*, 2 Lev. 90; *Packman's Case*, 6 Coke, 18; *Wilson v. Pateman*, Moore, 396; S. C., Cro. Eliz. 460; 1 Williams on Executors, 479; 2 Roberts on Wills, 63; 2 Bac. Abr., tit. Executors, E, 12; Toller on Executors, b. 1, c. 2, sec. 8.

Such are the cases where a will has been proved, and letters testamentary issued, and a subsequent will has been produced and proved: 1 Williams on Executors, 478; Wentworth on Executors, 111, 112.

Where letters of administration have been granted, and there is a will then known: *McChord v. Fisher*, 13 B. Mon. 193; *Moore v. Smith*, 11 Rich. 569 [73 Am. Dec. 122]; *Jacob v. Allen*, 1 Salk. 27.

Where a will offered for probate in common form has been adjudged not proved, letters of administration have been issued, and the will is, upon appeal, subsequently proved in solemn form: *Kittredge v. Folsom*, 8 N. H. 109; *Patton's Appeal*, 31 Pa. St. 465.

In these cases, it was formerly held that the probate or administration was wholly void: *Graysbrook v. Fox*, Plowd. 280; *Abram v. Cunningham*, 2 Lev. 182.

So, where a will has been proved in common form, and letters testamentary issued, and upon proceedings in solemn form, it is not proved: 1 Williams on Executors, 478.

Where there is an executor duly appointed and acting, with powers not limited by the will, and an administrator is appointed *de bonis non*: *Creath v. Brent*, 3 Dana, 129; *Springs v. Erwin*, 6 Ired. 27; *Griffith v. Frazier*, 8 Cranch, 9; *Matthews v. Douthitt*, 27 Ala. 273 [62 Am. Dec. 765]; though it is said that in these cases the appointment is a nullity.

When administration is granted without such notice as the law requires, *non vacatis jure vocandis*: 1 Williams on Executors, 479; *Harrison v. Weldon*, Strange, 911; *Harrison v. Mitchell*, Fitz-G. 303; S. C., *Ravenscroft v. Ravenscroft*, 1 Lev. 305; Com. Dig., tit. Administrators, B, 8.

Where administration is granted without notice to a person not entitled, upon false suggestion as to the facts, or by fraud,

or surprise: *Harrison v. Mitchell*, *supra*; *Anonymous*, 3 Salk. 22; *Carew's Case*, And. 803.

Where administration is granted to creditors, or remote kindred, before those previously entitled by law have voluntarily renounced their trust, or have neglected for thirty days to apply for administration: R. S., c. 158, sec. 5; *Munsey v. Webster*, 24 N. H. 126; *Stebbins v. Lathrop*, 4 Pick. 33; Com. Dig., tit. Administrators, B, 8; *Blackborough v. Davis*, 1 Salk. 38; *Anonymous*, Het. 48; *Price v. Parker*, 1 Lev. 157; *Mills v. Carter*, 8 Blackf. 203; *Thompson v. Hucklet*, 2 Hill (S. C.), 347; Toller on Executors, 125; *Offley v. Best*, 1 Sid. 293..

So where letters testamentary, or of administration, have been granted to a minor, or other person legally incompetent: *Carow v. Mowatt*, 2 Edw. Ch. 57.

The third class consists of cases where a qualified or limited administration has been granted upon a special occasion, and the cause of such special grant has ceased; as, if administration is granted during minority of an executor, and he has arrived at full age, and applies for letters testamentary: *Freke v. Thomas*, 1 Salk. 39; S. C., 1 Ld. Raym. 667; or *pendente lite*, during a suit about a will, and the will is established, and the suit otherwise terminated: *Kittredge v. Folsom*, 8 N. H. 109; or *durante absentia*, during the executor's absence, and he has returned: *Slaughter v. May*, 1 Salk. 42; S. C., 2 Ld. Raym. 1071; *Pipon v. Wallis*, 1 Lee's Ecc. 402; *Rainsford v. Taynton*, 7 Ves. 460; or because of incapacity, and the executor or next of kin is restored to competency: Gib. Cod. 479; *Offley v. Best*, 1 Sid. 372, 373; Com. Dig., tit. Administrator, B, 8; 4 Burns's Eccl. Law, 293; Williams on Executors, 429; *Goods of Newton*, 8 Curt. Ecc. 423; or until a will, supposed to exist in a foreign country, shall be produced, and such a will is proved: *Goods of Metcalfe*, 1 Addis. 343; *Howell v. Metcalfe*, 2 Id. 348; *Goods of Campbell*, 2 Hagg. Ecc. 555; 1 Williams on Executors, 426.

In none of the two last classes of cases, it is thought, can the probate, or letters of administration, be impeached collaterally, and generally they remain in force until regularly revoked: 1 Williams on Executors, 463; *Burnley v. Duke*, 2 Rob. (Va.) 102. So generally the acts done by the administrator *de facto* are valid until revocation: *Kittredge v. Folsom*, 8 N. H. 98; *Patton's Appeal*, 31 Pa. St. 465; *Foster v. Brown*, 1 Bailey, 221 [19 Am. Dec. 672]; *Bigelow v. Bigelow*, 4 Ohio, 138 [19 Am. Dec. 591]; 11 Vin. Abr., tit. Executors, M, 10, sec. 10; *Price v. Nesbit*, 1 Hill Eq. 445. And sales made

and discharges given are binding upon the executor or administrator subsequently appointed: *Digby v. Wray*, 3 Bac. Abr. 51; *Packman's Case*, 6 Coke, 186; *Wilson v. Pateman*, 1 Salk. 38; S. C., Cro. Eliz. 459; *Syms v. Sym*, T. Raym. 224; and *Semine v. Semine*, 2 Lev. 90; *Stephens v. Langley*, Finch, 40; and if he pays debts, legacies, funeral expenses, etc., he will be allowed for them: *Graysbrook v. Fox*, Plow. 279; *Hele v. Stowel*, 1 Cas. Ch. 126; *Allen v. Dundas*, 3 Term Rep. 125; though all the cases cannot be reconciled with these views.

Such administration is deemed the original administration; within the terms of the acts limiting suits against administrators: *Kittredge v. Folsom*, 8 N. H. 98.

No administrator can be removed without legal cause: Com. Dig., tit. Administrators, B, 8; Williams on Executors, 479; 1 Fonb. Eq., b, pt. 2, c. 1, sec. 5; 3 Bac. Abr., tit. Executors, E, 12; *Grandison v. Dover*, Skin. 155; S. C., 3 Mod. 23; *Taylor v. Shore*, T. Jones, 161; *Stover v. Ludwig*, 4 Serg. & R. 201; *Price v. Parker*, 1 Lev. 157; *Offley v. Best*, 1 Sid. 298; S. C., 1 Lev. 18; nor without a citation, or notice to be heard: *Wingate v. Wooten*, 5 Smedes & M. 245; *Murray v. Oliver*, 3 B. Mon. 1; *Gasque v. Moody*, 12 Smedes & M. 153; *Bieber's Appeal*, 11 Pa. St. 157; 1 Williams on Executors, 463.

The decree appealed from declares the appointment of the appellant as executrix void, and revokes the letters testamentary issued to her, on the ground that no legal bond has been given by her. The jurisdiction of the court is not questioned, and there is nothing which shows that any question was raised or considered by the court as to the form of the bond; and the only question is, whether the appointment was properly revoked for that cause. The statute requires that the executor named in the will, being of age and capable, and who has not renounced the trust, shall be appointed. The appellant was consequently properly appointed, and no other person under the circumstances could be legally appointed. The appointment could not rightfully be adjudged void. It was made on the condition required at common law and by the statute, that the executor should give the bonds required by the law for the faithful performance of his duties. A failure to comply with that condition would furnish good cause to revoke the appointment. But such removal would not be justified, unless the circumstances indicated intentional wrong or gross negligence. It would be quite unjust and irregular that an executor who had been duly appointed, and had filed

a bond, supposed to be proper and suitable, should be removed without notice and opportunity to file a new bond: *Wingate v. Wooten*, 5 Smedes & M. 245. If no such opportunity was afforded in the court of probate, it would, of course, be allowed in the court of appeal. Letters testamentary can be properly issued only where the condition of the appointment of executor has been complied with. If issued where the bond required by law has not been given, they may be properly revoked as having issued improvidently, and new letters would be issued when the proper bond was given.

It is contended that the petitioner and appellee in this case is not a creditor of the estate, and that he has no right to raise any question in relation to the administration; because, though he was a creditor at the decease of the testator, he has not exhibited his claim to the executrix within two years, nor commenced a suit upon it within three years from the original grant of administration. We understand it to be in effect decided, in *Kittredge v. Folsom*, 8 N. H. 109, that in general, if the letters of administration are not void, but voidable, that is, if they are sufficient until revoked, they make the executrix administrator *de facto* of the estate; the administration would be deemed the original administration, and creditors would be bound to present their claims and commence their suits against her, or they would be barred by neglect. But the statute which prescribes these limitations (R. S., c. 161, sec. 3) contains this exception: "If the administration on any estate shall be suspended, any demand may be exhibited within two years, exclusive of this suspension." Consequently, if the powers of an executor or administrator may be deemed suspended until his bond is filed, either by the terms of the decree, or by virtue of the statute (R. S., c. 158, sec. 12), then the appellee's claim is not barred. This statute provides that "no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond," etc., as prescribed. On this point we have no doubt. The power to act as executor, and to administer the estate, is dependent on the giving bond, and is suspended until that is done: T. U. P. Charlt. 149.

It is contended that the appellant was not residuary legatee, and the bond was not such as the statute requires. The provision of the Revised Statutes, c. 158, sec. 13, on this subject is as follows: "If the executor to whom administration shall

be granted shall also be residuary legatee, and if there shall be no widow, or if, there being a widow, she inform the judge in writing that she accepts the provisions of the will, a bond with sufficient sureties may be taken from him, with condition only to pay the funeral charges, debts, and legacies, and to render upon oath an account of his proceedings, when thereto lawfully required."

As many persons have been ruined by giving bonds in this form, we think it the duty of judges of probate always to discourage this kind of security, and to take special care that no such bond is received in any case where it is not beyond doubt that the estate is solvent; that the sole executor is the residuary legatee, and the widow, if any, has given the proper notice that she accepts the provisions of the will.

The residuary clause in the will here in question is as follows: "I give to my wife," etc., "so long as she remains my widow, all my real estate in Seabrook and Salisbury," etc., with remainder over, etc., "and lastly, as to all the rest," etc., "of my personal estate whatsoever, after payment of my just debts and funeral charges, I give the same to my wife, whom I appoint my sole executrix."

It is contended that this bequest does not constitute the wife residuary legatee, because it does not appear that there is not other real estate not situate in Seabrook and Salisbury, which would be undevised. Whatever may be the force of the word "legatee" in England, where only the personal estate passes to, or is administered by, the executor, we doubt if any one here can be deemed residuary legatee, unless all the property not otherwise disposed of by the will, whether real or personal, is given to him.

The position taken rests on the decision in *Tappan v. Tappan*, 30 N. H. 50, where it was held that a bequest of "all the rest, residue, and remainder of my estate, whether real or personal, in Claremont aforesaid, wheresoever being," does not make the legatee a residuary legatee, nor entitle him to give bond to pay the debts and legacies, and for the reason that, being limited to property in Claremont, the court cannot know that the residue thus described includes the whole estate not bequeathed or devised. *Prima facie*, this case falls within that decision. Upon the reading of the will, it does not import a devise of all the real estate, and the court cannot know that there is not real estate upon which the will does not operate. But it is insisted that this decision does not apply

where it appears that there is no estate not disposed of by the will; and it is admitted here that there was no other property but that referred to in the will. The question is, then, if extrinsic evidence of the nature and amount of the testator's property is admissible to aid the court in giving a construction to this will, and in determining whether the bequest here, though purporting to be of personal estate only, was really the whole residue. This question, in effect, has been often considered, and admits of no doubt. In *Webster v. Atkinson*, 4 N. H. 22, Richardson, C. J., says, in giving a construction to a will, that evidence of the situation and circumstances of the parties has been admitted to aid the court in forming an opinion. In *Second v. First Congregational Society*, 14 Id. 327, Parker, C. J., says, in the language of Wigram on Extraordinary Evidence, 51, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed to be the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will: 1 Greenl. Ev. 52, note. The same principle is stated, in other words, in *Trustees v. Peaslee*, 15 N. H. 327, and in *Goodhue v. Clark*, 37 Id. 532; in the language of Parke, B., in *Hewlett's Case*, 5 Scott N. R. 958.

It being, then, admitted that there was no other real estate, it is evident that the bequest was of the whole residue of the testator's estate, and the bond given was legal.

Nothing is said in the case, or papers, relative to any notice given by the widow to the judge, that she accepted the provisions of the will, which is one of the conditions without which a bond to pay debts and legacies cannot be taken; but we think the application of a widow, who is herself executrix and residuary legatee, for probate of the will, would be a sufficient writing to inform the judge of her acceptance of the will, if nothing in it indicate the contrary: *Worth v. McAden*, 1 Dev. & B. Eq. 199.

The decree must be reversed, and the petition dismissed, with costs.

POWER OF PROBATE COURT TO REVOKE PROBATE OF WILL: See *Bowen v. Johnson*, 73 Am. Dec. 49, note 62, where other cases are collected.

FAILURE OF ADMINISTRATOR TO GIVE BOND, renders the administration voidable only, but not void: *Ex parte Maxwell*, 79 Am. Dec. 62, note 66, where this subject is discussed.

STATE EX REL. HODGDON v. LIBBEY.

[44 NEW HAMPSHIRE, 321.]

FATHER IS ORDINARILY ENTITLED TO CUSTODY OF HIS MINOR CHILDREN, and upon *habeas corpus*, courts have power to award it to him. But the application is addressed to the discretion of the court, and such custody may be withheld from the father when it is made clearly to appear that by reason of his unfitness for the trust, or of other sufficient causes, the permanent interests of the child would be sacrificed by a change of custody.

COURT WILL, IN DETERMINING QUESTION OF CUSTODY OF CHILD, TAKE INTO CONSIDERATION its condition with the persons from whose custody it is sought to be taken, its relation to them, the present and prospective provision for its support and welfare, the length of its residence there, and whether with the consent of its father, and the understanding, tacit or otherwise, that it should be permanent, the strength of the ties that have been formed between them, and if the child has come to years of discretion, its wishes upon the subject.

RIGHTS AND DUTIES OF FATHER CANNOT BE TRANSFERRED PERMANENTLY EXCEPT BY DEED, and a parol agreement to transfer them may be revoked by the father, upon refunding the sums of money expended under it.

HABEAS CORPUS. The facts are stated in the opinion.

Wheeler and Hall, for the relator.

Christie, for the respondent.

By Court, BELLows, J. Ordinarily, a father is entitled to the custody of his minor children, and upon *habeas corpus* both courts of law and equity have power to award it to him. The application, however, being addressed to the sound discretion of the court, such award will be withheld when it is made clearly to appear that by reason of unfitness in the father for the trust, or other causes, the permanent interests of the child would be sacrificed by such change of custody; and in deciding upon this question, the court will take into consideration the condition of the child with the persons from whose custody it is sought to be taken; its relation to them; the present and prospective provision for its support and welfare; the length of its residence there, and whether, with the consent of its father, and the understanding, tacit or otherwise, that it should be permanent; the strength of the ties that had been formed between them, and if the child has come to years of discretion, its wishes upon the subject.

But while we should be disposed to consider the consent of the father that the respondent should have the custody and nurture of the child, as an important element in determining the exercise of the judicial discretion, especially where it had

been suffered to continue for many years, with its natural fruit of strong mutual affection; yet we are of the opinion that, as matter of law, the parental right and authority cannot be assigned or transferred by a parol contract.

It is true, there are decided cases which hold that the father may be barred by an assignment by deed, though lacking the form required by the statute for indentures of apprenticeship. But however this may be, we think that the preponderance of authority is against the legal validity of an assignment by parol.

At the same time there is no doubt that the father may bind himself, by a verbal contract, that his minor son shall labor for another for a year, or other period; and so by sending him to school he may confer upon the school-master the right, while the relation lasts, to enforce obedience to his rules; but neither the hirer of the servant, nor the school-master, acquires over such minor any permanent control which the father cannot recall, any more than the master does over the servant who is of age and agrees to labor for a specified term, but refuses to perform it, in which case the only remedy is by suit, and recovery of damages for a breach of contract.

So, in the case of the agreement by the father for the labor of the minor son; the master acquires no power to restrain the liberty of the son against the authority of the father, but must resort to his action for the breach of the contract. Upon the general subject of the power of the father to delegate his parental authority, it is laid down by Mr. Chancellor Kent (2 Kent's Com. 264), that it is a settled principle of the English and American law that the relation of master and apprentice cannot be created, and the corresponding rights and duties of the parent transferred to a master, except by deed. So, in *Castor and Aicles, In re*, 1 Salk. 68; also *Queen v. Daniels*, 6 Mod. 182, where it is said that there is a distinction between a servant and an apprentice; that the latter can be only by deed, and discharged only by deed, while the former may be by parol, citing 21 Hen. VI., pl. 23. So in *Squire v. Whipple*, 1 Vt. 69, where the father was sued for the breach of a parol contract of apprenticeship, by which his son was placed with the plaintiff to learn the trade of a tanner, and the defendant agreed that the son should serve the plaintiff until he was twenty-one years of age, but he left before that time. It was held that such a contract could be proved only deed; and it was laid down by Royce, J., that the "necessity of a deed con-

sists in the effectual renunciation of the natural rights of the parent, and the substitution of the master in his place, so as to draw after it all the corresponding rights and duties. In this point of view, the transaction is highly solemn and important, and fully vindicates the wisdom of that peculiar care with which the common law has guarded it." In *King v. Arnesby*, 3 Barn. & Ald. 584, it was held that at common law a father could not bind his minor son apprentice without his consent, which must be by deed. So it is held that the indentures of an apprenticeship could not be discharged by parol: *Rex v. Skeffington*, 3 Barn. & Ald. 382; *Rex v. Bow*, 4 Maule & S. 383. See also, upon the general question, Reeve's Dom. Rel. 341; 1 Swift's Dig. 61; *Commonwealth v. Wilbank*, 10 Serg. & R. 416.

In accordance with the doctrine that the father cannot by parol delegate to another his parental rights and authority over his infant child, is the case of *State ex rel. Mayne v. Baldwin*, 5 N. J. Eq. 454 [45 Am. Dec. 399]. In that case, the child was taken by the respondent with the consent of the father, the relator, to be adopted and brought up until of full age, as his own, and the return stated that she was so adopted and kept by him about sixteen months, when the writ was issued, the child then being five years and seven months old. The court held the agreement to be void as a contract of apprenticeship, and awarded the custody to the father.

The same doctrine was held in *State v. Clover*, 16 N. J. L. 419. In the case of *People v. Mercein*, 3 Hill, 408-411 [38 Am. Dec. 644], Cowen, J., holds that the parental rights and duties cannot be alienated, unless by indentures of apprenticeship, which he regards as an exception to the rule that ought never to be extended; and a similar view seems to be entertained by Chancellor Walworth, in *People v. Mercein*, 8 Paige, 67. In *Westmeath v. Westmeath*, reported in note to *Lyons v. Blenkin*, 1 Jacob, 251, the child was in the custody of the respondent, the mother, who was then living apart from her husband, the relator, in pursuance of a deed of separation, in which the husband covenanted that in the event of a separation he would permit their daughter, and such other children as they might have, to be and reside with the wife, and be educated under her care and superintendence; and by a subsequent deed a provision was made for the separate maintenance of the wife, and an annual allowance was agreed to be raised and paid to her for the maintenance of the infants. The

children were, one five years, and the other seven months old, and the custody was awarded to the father. This case is cited and approved in *People v. Mercein*, 8 Paige, 67, as having gone upon the ground that the instrument was a contract for a future separation; and this is countenanced by the case of *Hindley v. Westmeath*, 6 Barn. & C. 200. In *Regina v. Smith*, 16 Eng. L. & Eq. 221, the father had agreed to let the child live with its uncle, who was to maintain and educate it until old enough to take care of itself; and the father promised not to remove the child from the uncle's care, or interfere with its education, but permit it to remain with him as his adopted child; and also agreed to pay him fourteen shillings per month for such support and education. On *habeas corpus*, it was decided that this agreement, which was apparently in writing, was in the nature of a consent which the father might revoke; and the custody was awarded to the father.

In *State v. Scott*, 30 N. H. 274, the mother, a widow, sent the child to the Shakers, with the request that the child should remain there as long as he was contented, and about a year afterward she visited the society, and expressed herself fully satisfied that he should remain there. The court say that if she had power to bind him apprentice, there is no suggestion that such power was legally exerted. In *Campbell v. Cooper*, 34 Id. 49, it is held that no contract for the services of the child can bind it beyond the time of the father's death, except by indentures of apprenticeship according to the statute, and therefore a parol gift could not be valid beyond the father's lifetime; and the court intimate that according to *Mayne v. Baldwin*, 5 N. J. Eq. 454 [45 Am. Dec. 399], such delegation of authority might be at any time revoked.

The principle to be gathered from these cases is, that the rights and duties of the father cannot be transferred permanently to another, except by deed, and this seems to be the well-settled doctrine of the common law. It is true, there are cases where, on *habeas corpus*, the court have refused to award the custody of the child to the father, where he had consented that it should be brought up and adopted by the respondent, and had, accordingly, for many years permitted it so to remain. Such is the case of *Pool v. Gott*, 14 Boston Law Rep. 269, before Shaw, C. J., at chambers, where the child was given up at its birth, its mother having then died, to its grand-parents, who kept it at their own expense for thirteen years, without any demand by the father for its restoration. The court, as-

suming that it was mutually understood that the child should remain with them, and they to stand *in loco parentis*, refused to award the custody to the father, saying that as the child was allowed to remain so long and the affections of the grandparents and itself to become fixed and engaged, the relation could not be sundered without much suffering, and without risking the happiness of the child, who desired to remain; and the court also take into consideration that the grandparents were in good circumstances, and would provide for the child at their death. Under such circumstances, the judge might, perhaps, very properly, in the exercise of his discretion, refuse to give up the child to its father; but the decision is not based upon the ground that he had parted with his parental rights by verbal contract, although there are remarks which might seem to imply that it might be done. It is quite apparent that there may be cases where the father's conduct is such; as by permitting, tacitly or by express agreement, another to assume and discharge for many years the duties of parent to his child, with an understanding that the relation was to be permanent, he could not afterward attempt to reclaim his child in good faith, nor without subjecting to serious hazard its interests and happiness. In such a case, the award of the custody of the child would not be consistent with the exercise of a sound judicial discretion; but at the same time the court would not be justified in withholding from him that custody upon the ground merely that there had been a parol gift of the child, or an agreement for its adoption by another, but without any subsequent formation of ties under it, or change of condition that would cause the resumption of the parental authority to jeopardize the interests or happiness of the child.

In this case, the child, then about two years and five months old, was placed with the respondent in February, 1859, and maintained by him until December, 1862, when this application was made; and it appeared that until about December, 1861, a period of nearly three years, the father gave no notice of his wish to have the child restored to him. Upon the subject of the terms upon which the child was taken by the respondent, the evidence is conflicting; but upon a careful consideration of it, we think that the return is not impeached, but that the father placed the child in the custody of the respondent, with an agreement that it should be his, and be brought up by him. And the question now is, whether, in the exercise of a sound judicial discretion, the custody of the

child ought to be withheld from the father. The child had been suffered to remain with the respondent nearly four years before the application, and she is now about six and a half years old; and assuming that there is nothing in the character of the father or step-mother that renders them unsuitable to be intrusted with the nurture of the child, we can see nothing in the other circumstances that would make the change of custody sought for hazardous to the permanent interests and welfare of the child; certainly not to such an extent as to justify a final severing of the ties which bind the parent and the child together.

This accords with the views expressed in *State v. Richardson*, 40 N. H. 272, which, so far as the welfare of the child is concerned, was a stronger case than this, and is decisive of the question here, unless we give to the parol agreement a force to which it is not entitled.

Our opinion therefore is, that upon refunding the sums of money expended by the respondent under the agreement, the father may revoke his consent, and thereupon the custody of the child may be awarded to him; and the time being fixed for the refunding of the money so expended, the cause is continued for further proceedings.

RIGHT OF FATHER TO CUSTODY OF CHILD IS PARAMOUNT to that of the mother: See *Magee v. Holland*, 72 Am. Dec. 341, note 347.

CUSTODY OF CHILD ON HABEAS CORPUS: See *State v. Smith*, 20 Am. Dec. 334, note 330, where this subject is discussed.

WENTWORTH v. SMITH.

[44 NEW HAMPSHIRE, 412.]

IN ACTION AGAINST POSTMASTER FOR NEGLIGENCE BY WHICH LETTER OF PLAINTIFF WAS LOST, evidence of specific acts of negligence in relation to other letters is not admissible to prove negligence in respect to the letter in question.

CASE to recover for the loss of a letter containing money, alleged to have been lost through the negligence of the defendant, who was the postmaster at Lancaster. To prove that the letter in question was lost by the negligence of the defendant and his servants, the plaintiff offered evidence to prove that letters received at the office were put into drawers of persons to whom they were not addressed, and that other letters were delivered to persons to whom they were not addressed.

To this evidence the defendant objected, but the court overruled the objection. The plaintiff called nine witnesses who testified to instances, varying from one to four each, of deliveries of letters to persons not entitled to receive them. The court charged the jury as stated in the opinion, and the jury returned a verdict for the plaintiff. The defendant moved to set aside the verdict.

Benton and Ray, for the plaintiff.

Burns and Fletcher, for the defendant.

By Court, BELLOWES, J. The instructions were in substance and effect that it was not necessary to show any particular act of negligence in relation to the letter in question; but if the plaintiff proved a general want of common care and diligence in the assortment and delivery of letters, and the jury were satisfied that the plaintiff's letter was lost by reason of it, the defendant would be liable; in short, that proof of general want of care and diligence was admissible on the question of negligence in respect to the letter in question.

As a general principle, proof of collateral facts is not admissible, for the reasons that the attention of the jury would otherwise be diverted from the true merits of the controversy, the field of investigation greatly extended, and the expenses of the litigation indefinitely increased; and at the same time subjecting the parties to the necessity of meeting such proof without any previous notice: 1 Greenl. Ev., secs. 52, 448. There are cases, however, where general evidence bearing upon the character of parties or witnesses will be received, as in criminal trials, where the respondent is permitted to prove his previous good character; or in prosecutions for a rape, the character for chastity of the prosecutrix. So in civil cases, where the action involves the general character of a party, or goes directly to affect it; as in the case of a suit by the husband or father for the seduction of a wife or daughter, where evidence may be received impeaching the character of either for chastity. So also for the purpose of impeaching a witness who has been examined.

In these and other cases which might be mentioned, proof of the character of the party or witnesses may be shown; but it must be by evidence of his general reputation alone, and not of particular facts; because, although every man is supposed to be prepared to support the one, he cannot be presumed to be ready to answer the other without notice.

There is another class of cases, both civil and criminal, where the knowledge or intent of a party, being directly in issue, may be proved by facts which otherwise would be regarded as collateral. Among these is the case of a fraudulent conveyance, where proof of other fraudulent conveyances by the grantor, about the same time, is admissible to show his interest. So where the issue is whether goods were obtained by fraudulent pretenses, proof that other goods were obtained about the same time by the vendee by similar pretenses is admissible. Similar proof also is admitted to show the guilty knowledge or intent in the case of an indictment for uttering counterfeit bank notes, or having them in one's possession with intent to utter them. In these and the like cases, the facts so offered in evidence have a direct bearing upon the question of the knowledge or interest which is in issue, and are received the same as a verbal declaration of the party, tending to show such knowledge or intent; and their admission is no exception to the general rule. But the proof of collateral facts seems to be limited to cases where the purpose is to show knowledge, intent, or malice: 4 Stark. Ev. 380; 1 Greenl. Ev., sec. 53; *Hollingham v. Head*, 4 Com. B., N. S., 388, decided in 1858.

The case before us does not come within the principle of either class of the cases referred to; and it is well settled, as a general proposition, that proof of negligence in one instance is not admissible to prove it in another: *Malton v. Nesbit*, 1 Car. & P. 70; *Robinson v. Fitchburg & W. R. R.*, 7 Gray, 92, where it was held that evidence of specific acts of negligence and carelessness in an engineer in running the train on other occasions than the one in question, was clearly incompetent. Upon the same principle, in *Swamscott Machine Co. v. Walter*, 22 N. H. 457 [55 Am. Dec. 172], where the issue was, whether the defendant or Wing and Thompson contracted; proof that the plaintiff had previously refused to trust them was held to be collateral and inadmissible. So in *Hollingham v. Head*, 4 Com. B., N. S., 388, where the question was whether a sale of guano was conditional, and not to be paid for unless of a certain quality, it was held that it could not be shown, even on cross-examination of the plaintiff himself, that he had made other sales upon similar conditions.

But it is claimed that the evidence received in this case was to establish a general want of common care and diligence, and not to prove merely another specific act of negligence. If such proof was admissible at all, it should be by evidence

of general reputation, as in the cases referred to; otherwise it is open to the objection of multiplying issues, and calling upon the party to meet them, without previous notice; but we are of opinion that the evidence is not admissible in any form. It is in truth nothing more than the proof of other specific acts of negligence, to render it more probable that existence existed in respect to the act in question, although in form it is offered to prove general negligence; because, whether the specific acts of negligence are sufficient to prove general negligence or not, is for the jury to determine; and it would be difficult to lay down a rule that would enable the court to say that a single act, complicated as it might be by a variety of circumstances, had no tendency to prove general negligence; and it might safely be asserted that it would rarely happen, in the case of a common carrier by land or by water, a factor, postmaster, or other general depository, that enough might not be shown under the idea of proving general negligence to bring under consideration any and every specific act, inasmuch as in respect to almost every act resulting in loss or injury, evidence of negligence sufficient to go to the jury might be adduced.

Were the acts offered in evidence in their nature continuing, such as the careless construction of unsafe places of deposit for letters, the rule would be otherwise; but here there is no logical connection between the act in question and other similar acts; and in this respect it stands much like the case put by Willis, J., in *Hollingham v. Head*, 4 Com. B., N. S., 388, before cited, of an attempt in an action for an assault to prove former assaults by the defendants upon others, for the purpose of showing him to be quarrelsome, and thus render it more probable that he was guilty in the instance in question. In such a case it is clear that such evidence could not be received, even upon an indictment for the assault, unless the respondent had first offered evidence of good character, and then it must be confined to proof of reputation.

It doubtless may be difficult at all times to draw the line between those acts which are continuing in their nature and those which are not; or those which are and those which are not collateral; but we think that, on a careful examination of the adjudged cases, no principle can be found that will admit the evidence under consideration to bear upon the question of negligence in respect to the letter in question. We are aware of the decision in *Christy v. Smith*, 23 Vt. 663; but

it will be perceived that the general proof of negligence referred to by the learned judge who gave the opinion, does not embrace evidence of the character now in question. On the trial of that cause, the defendant's counsel requested the court to charge the jury that the plaintiff must show some particular act of negligence in relation to the letter in question; but the court instructed the jury that it was enough to show a general want of common care, either in the construction of his places of deposit for letters, so that they were unsafe, or in the management of the post-office, in permitting persons to go behind the railing who had no legal right to go there, and that the letter was lost in consequence of such negligence; and these instructions were sustained by the whole court. There was evidence as to the construction of the letter-boxes, and that the defendant, during the period when the loss occurred, allowed persons not sworn to go behind the railing; but there was no evidence of the loss of other letters. This case is not, therefore, an authority that other acts of negligence, in relation to other letters, might be weighed on the question of negligence, in respect to the letter in question, unless such acts were in their nature continuing. Had the evidence in the case before us been received merely to prove that a clerk, by whose negligence the letter in question was lost, was an unfit person to be appointed or continued in office, and that his unfitness must have been known to the defendant, who was consequently negligent in superintending the discharge of such clerk's duties, we think no objection could have been made to it; but the instructions do not confine the evidence to that object. On the contrary, it authorizes the jury to weigh the testimony upon the point of negligence in the loss of the letter in question, and to that extent we think the instructions were erroneous. In the general direction of these views are the cases of *Jackson v. Smith*, 7 Cow. 717, where it was held that the general character or habit of an usurer is not a foundation for finding usury in a particular loan: 2 Cowen & Hill's Notes to Phill. Ev. 330, 332; *Holcombe v. Hewson*, 2 Camp. 391; 1 Stark. Ev. 17-39; 4 Id. 381; *Phelps v. Conant*, 30 Vt. 277; *Collins v. Dorchester*, 6 Cush. 396; *Hubbard v. Concord*, 35 N. H. 52 [69 Am. Dec. 520]; 1 Greenl. Ev., sec. 52.

Upon these views, there must be a new trial.

IN ACTION FOR NEGLIGENCE EVIDENCE OF PREVIOUS CONDUCT and acts of defendant, when admissible and when not: See *Gahagan v. Boston & L. R. Co.*, 79 Am. Dec. 724, note 727, where other cases are collected.

CASES
IN THE
SUPREME COURT OF ERRORS AND
APPEALS
OF
NEW JERSEY.

RANDALL v. ROCHE.

[1 VROOM, 220.]

VESSEL LIEN LAW OF NEW JERSEY APPLIES TO FOREIGN as well as to domestic vessels.

LIEN FOR SUPPLIES FURNISHED FOREIGN VESSEL ON CREDIT OF OWNER OR MASTER IS NOT MARITIME LIEN, within the jurisdiction of courts of admiralty of the United States, but may be provided for by state statutes and enforced by state courts.

LIEN FOR SUPPLIES FURNISHED FOREIGN VESSEL IS NOT EXCLUDED FROM STATE COGNIZANCE, by the provision of the United States constitution, giving to Congress the power to regulate commerce with foreign nations, and among the several states, if Congress has not legislated on the subject.

ADMIRALTY JURISDICTION OF UNITED STATES COURTS IS EXCLUSIVE; but it is jurisdiction over admiralty causes, and not jurisdiction over all causes affecting foreign vessels, or over all liens on such.

ACTION on a bond. The pleas were demurred to. The facts are stated in the opinion.

I. W. Scudder, for the plaintiff.

Gilchrist, for the defendant.

By Court, **ELMER, J.** The action in this case is upon a bond given under the twelfth section of the act entitled, "An act for the collection of demands against ships, steamboats, and other vessels": 3 Nix. Dig. 529. The pleas demurred to aver, in substance, that the vessel in question, called the Pope Catlin, was a foreign vessel, enrolled in the state of New York, and

owned by Roche, one of the defendants, the master of said vessel, and another person, both of whom resided in New York, and not in New Jersey. It was insisted by the counsel for the defendants that the act above referred to does not apply to such vessels; and if it does, that so far as it purports to give a lien for supplies furnished to a vessel engaged in commerce and navigation between different states, it is in conflict with the constitution and laws of the United States, which give exclusive jurisdiction of admiralty and maritime causes to the courts of the United States. The terms of the act certainly include all descriptions of vessels, and however impolitic such lien laws may be justly regarded, they are, at present, evidently much in favor with those who control our state legislation, and whether wise or unwise, must be enforced according to their true intention by our courts. The act is copied from the New York law, where it has always been regarded as applying to foreign vessels; indeed, for many years, only such vessels were affected by it: *Birkbeck v. Hoboken F. B. Co.*, 17 Johns. 54; *Walker v. Blackwell*, 1 Wend. 557; *Many v. Noyes*, 5 Hill, 34; *Pendleton v. Franklin*, 7 N. Y. 508. Similar laws exist in many of the eastern and western states.

In regard to the conflict of jurisdiction, none of the pleas show that the lien sought to be enforced was within the jurisdiction of the admiralty. The debt was contracted by Roche, the master of the vessel, and the pleas show that he was also one of the owners. By the maritime law of this country, where a master obtains supplies in a foreign port (and a port in a different state from that in which the vessel is owned is for this purpose held to be a foreign port), which are necessary to enable the vessel to proceed, it is presumed that he makes the contract on the credit of the vessel, and there is a lien which will be enforced by the admiralty courts; but if the supplies were obtained by an owner or part-owner, or if the master obtains them on his own credit, they are not liens: *The Virgin*, 8 Pet. 538; *Thomas v. Osborn*, 19 How. 22.

It will not be necessary, in this case, to decide whether a proper maritime lien can be enforced in any other mode than by a proceeding in admiralty; and in view of the difficulties which beset the whole subject, and the diversity of opinion which has hitherto prevailed among the judges of the supreme court of the United States, it is best to express no opinion: See *Jackson v. Steamboat Magnolia*, 20 How. 296, and *Taylor v. Carryl*, Id. 583. But if it be admitted that the state courts

have no jurisdiction in such a case, to divest the state courts, it must be clearly shown that the lien in question was of that description. The facts stated raise no such presumption, nor is it averred, in terms, that the lien was one that came within the jurisdiction of the admiralty.

Judge Story, in the case of the *Barque Chusan*, 2 Story, 461, has made some observations which would seem to imply that he considered the New York statute would be unconstitutional if applied to a foreign vessel. Judge Nelson, however, in the case of *The Globe*, 2 Blatchf. 430, takes a different view of it, and treats it as creating a good lien. He notices Story's remark, and says: "But this remark was made in answer to the argument that the statute controlled the jurisdiction of the admiralty, and in that view the statute would have been unconstitutional."

Chief Justice Watkins, in the case of *Merrick v. Avery*, 14 Ark. 378, gives an able opinion on the lien law of Arkansas, and remarks, correctly, I think, that the beneficial operation of that law was to extend the privilege of the maritime lien upon seagoing vessels, for their building or equipment in domestic ports, just as that lien existed in Europe, and would have prevailed in England, and so descended to this country, but for the jealousy of the common law.

It was urged by counsel that the provision in the constitution of the United States giving to Congress the power to regulate commerce with foreign nations and among the several states would exclude this lien from state cognizance. Much of the difficulty on the subject probably has arisen from confounding this clause with that giving jurisdiction to the federal courts in admiralty. If the legislative power given to Congress to regulate commerce had been held to be exclusive, as is, perhaps, the better opinion, it would have covered the whole case, and no state legislature could create a new maritime lien, or in any way interfere with foreign commerce or commerce between the states. Such, however, is not the doctrine of the supreme court. That court holds the power over commerce to be, so far as it is exercised, paramount to state legislation; but the power of the state remains, in other cases, untouched, so that what Congress has not regulated each state may regulate for itself within its own territory. As the constitution is now construed, Congress may declare what debts shall be liens on foreign vessels, and that no others shall be, and thus render maritime liens uniform throughout the Union;

and it will probably not be long before it will be found indispensable to do this. Large foreign ships are now liable to be seized by attachments, and other state process, in such manner as may seriously embarrass commerce. But until this is done, the states may create new liens on vessels and enforce them.

What are properly admiralty and maritime causes, it has been found very difficult to define, and cannot be said yet to be definitely settled. In its nature, however, the admiralty jurisdiction is exclusive. But it is jurisdiction over admiralty causes, and not jurisdiction over all causes affecting foreign vessels, or over all liens on such. At one time the admiralty courts enforced liens exclusively of state creation, a practice now abandoned as untenable: *Allen v. Newberry*, 21 How. 245; *Maguire v. Card*, Id. 249. If a cause does not belong to the admiralty courts, they cannot interfere. When it does, the states cannot abridge or in any way control it. In all cases the common law remedies remain and may be resorted to in the state courts. What is a common-law remedy, and how far the state laws may change the course of proceeding, are difficult questions I shall not now examine. A debt constituting a maritime lien may be collected by a common-law remedy, but admiralty proceedings cannot be instituted in state courts. Any cause of action which does not constitute an admiralty cause within the decisions of the supreme court of the United States, is not affected by the constitution of the United States. The state legislation may provide new liens and new remedies for such causes in all cases of vessels or parties coming within its territory, and thereby becoming subject to its laws. It is simply a contradiction in terms to say that a cause which is not an admiralty or maritime cause belongs exclusively to a jurisdiction which is confined to such causes, and can embrace no others.

I am of opinion that the demurrers are well taken, and that the pleas are bad.

WHELPLEY, C. J., and HAINES and VAN DYKE, JJ., concurred.

ADMIRALTY JURISDICTION OF UNITED STATES COURTS IS EXCLUSIVE: *Thoms v. Southard*, 26 Am. Dec. 467; compare *Case v. Woolley*, 32 Id. 54; *Thompson v. Steamboat Morton*, 59 Id. 658. In *Edwards v. Elliott*, 36 N. J. L. 454, it was said that it was unnecessary to consider whether the doctrine was opposed to the principal case, that so far as the New Jersey statute was designed to aid in the enforcement of a maritime contract for which admiralty may proceed *in rem*, it is in conflict with the constitution and laws of the United States.

LIEN FOR SUPPLIES FURNISHED VESSEL, WHETHER EXISTS BY MARITIME LAW: See *Case v. Woolley*, 32 Am. Dec. 54.

ADAMS v. ROSS.

[1 VROOM, 505.]

COVENANT WARRANTING LAND TO GRANTEE AND HIS HEIRS CANNOT ENLARGE ESTATE, nor pass by estoppel a greater estate than that expressly conveyed.

COVENANT OF WARRANTY ATTACHES ONLY TO ESTATE GRANTED, or purported to be granted. If a life estate only is expressly conveyed, the covenantor warrants nothing more; the conveyance is the principal, and the covenant the incident.

GRANTOR MUST EXPRESS HIS INTENT AS TO ESTATE GRANTED BY USE OF NECESSARY WORDS OF CONVEYANCE. In construing a deed, the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention, will supply the omission.

WORD "HEIRS" IS NECESSARY TO CREATE ESTATE IN FEE-SIMPLE.

WORDS OF PROCREATION, AS WELL AS OF INHERITANCE, ARE NECESSARY TO CREATE ESTATE-TAIL.

GRANTEE TAKES ESTATE FOR LIFE, WITH VESTED REMAINDER FOR LIFE TO CHILD OF MARRIAGE, born after the conveyance, subject to open and let in after-born children, by a deed in which the grantor, in consideration of love and affection, and of one dollar, grants, bargains, sells, aliens, remises, releases, and confirms certain lands to the grantee, for and during her natural life, and at her death to her children which may be begotten of her present husband, with a covenant of warranty, among others, made by the grantor for herself and her heirs with the grantee, her heirs and assigns; and the husband of the grantee is not entitled to courtesy in the lands on surviving his wife.

MORTGAGE OF INFANT FEME COVERT CREATES NO VALID CHARGE on the lands, as against her.

ERROR to the supreme court. The facts are stated in the opinion.

A. O. Zabriskie, for the plaintiff in error.

J. P. Bradley, for the defendant.

By Court, **WHELPLEY, J.** This writ of error brings up for review the judgment of the supreme court giving a construction to a deed, dated the 9th of September, 1854, between Anna V. Traphagen, of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the second part, by which the grantor, in consideration of natural love and affection, and of one dollar, conveyed to the grantee the premises in the deed described. The operative words are "grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband; to have and to hold the above-de-

scribed premises unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams."

The deed conveys covenants of seisin for quiet enjoyment against encumbrances, for further assurance and of warranty.

These covenants are made by the grantor for herself and her heirs with the party of the second part, her heirs and assigns.

Mrs. Adams, at the date of the conveyance to her, was a minor. On the 12th of October, 1855, she, with her husband, executed a mortgage to secure the payment of six thousand dollars, in one year from date, upon the premises conveyed to her. She was then nineteen. The mortgage was to Ross, the applicant in the supreme court.

The Erie Railway Company, under the provisions of an act of the legislature, took a part of the land in question, and hold it in fee-simple. The value of the land taken has been ascertained at \$3,061; that is now in the supreme court, to be awarded to the parties entitled to it, and who they are must depend upon the true construction of the deed.

What, then, are the rights of Mrs. Adams, her husband, and children, one having been born of the marriage since the conveyance; and what, if any, are the rights of Ross, the mortgagee, to the money in court?

The supreme court held that the estate granted by the deed was an estate in fee-tail special in Catharine Adams and the heirs of her body by her present husband; that her husband was entitled to curtesy; that the mortgage to Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband, in case he survived her.

This decision was reached by interpreting the word "children" in the deed, as equivalent to "heirs," calling in the covenants in aid of that interpretation, as throwing light upon what the court called the intention of the grantor.

The supreme court was right in holding the first estate conveyed to Mrs. Adams not a fee-simple; the express limitation of the estate to her during life, and after her death to her children, forbade any other conclusion. The covenant, warranting the land to her and her heirs general, cannot enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. A party cannot be estopped by a deed, or the covenants contained in it, from setting up that a fee-simple

did not pass, when the deed expressly shows on its face exactly what estate did pass, and that it was less than a fee: *Rawle on Covenants for Title*, 420; *Blanchard v. Brooks*, 12 Pick. 67; 2 Co. Lit. 385 b.

Lord Coke expressly says: "But a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs; yet doth not this enlarge his estate."

Justice Vredenburg, in his opinion, admits this to be law. He says, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were used. What is that but enlarging what would otherwise be their meaning? If without explanation they are insufficient to pass the estate, does not the explanation enlarge their operation?

The learned judge, in his elaborate opinion, says: "From these covenants it is demonstrated that, by the terms 'children by her present husband,' the grantor intended the heirs of her body by her present husband." It follows, from this argument, that although the conveying part of the deed may not contain sufficient to convey the estate as a fee-simple, for example, yet that if the covenants show an intent to pass a fee-simple, it will pass.

The argument is, that the words of conveyance and covenant must be construed together. If the covenants look to the larger estate, that will pass upon the intent indicated. Children are said to be equivalent to heirs, because she warranted to her heirs; and the heirs are said to be not heirs general, because she called them children.

The inconsistency between the conveyance and covenant shows mistake in the one or the other. The safest rule of construction is that propounded by the supreme court; that the quantity of the estate conveyed must depend upon the operative words of conveyance, and not upon the covenants defining the quantity of estate conveyed.

Starting with that premise, it seems difficult—nay, impossible—to reach the conclusion that the covenants are to be looked to in the interpretation of the conveyance as such.

The covenants only attach to the estate granted, or purporting to be granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they do not expressly enlarge the estate passed by the operative words of the

deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor. In the construction of a deed of conveyance the question is not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed.

The object of the covenants of a deed is to defend the estate passed, not to enlarge or narrow it. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries than to open so wide a door for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills; the difficulty in getting at the real intent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelled out what the party meant,—all combine to show the importance of adhering to the rule that the grantor of a deed must express his intent by the use of the necessary words of conveyances, as they have been settled long ago by judicial decision, and the writings of the sages of the law. Upon this point, it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here?

Littleton says: "Tenant in fee-simple is he which hath lands or tenements to hold to him and his heirs forever. For if a man would purchase lands or tenements in fee-simple, it behooveth him to have these words in his purchase: 'to have and to hold to him and his heirs.' For these words, 'his heirs,' make the state of inheritance. For if a man purchase lands by these words, 'to have and to hold to him forever,' or by these words, 'to have and to hold to him and his assigns forever,' in these two cases he hath but an estate for life, for that there lack these words, 'his heirs,' which words only make an estate of inheritance in all feoffments and grants.

"These words, 'his heirs,' doe not only extend to his immediate heirs, but to his heirs remote and most remote, born and

to be born, *sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri*, and *hæredum appellatione veniunt, hæredes hæredum in infinitum*. And the reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion": 1 Co. Lit., 1 a, 8 b; 1 Shep. Touch. 101; Com. Dig., tit. Estate, A, 2; Preston on Estate, 1, 2, 4, 5; 4 Cru. Dig., tit. 32, c. 21, c. 1.

There are but two or three exceptions to this rule: the cases of sole and aggregate corporations, and where words of reference are used, "as fully as he enfeoffed me"; a gift in frank marriage, etc., which are to be found stated in the authorities already cited.

These exceptions create no confusion; they are as clearly defined and limited as the rule itself.

The word "heirs" is as necessary in the creation of an estate-tail as a fee-simple: 1 Co. Lit. 20 a; 4 Cru. Dig., tit. 32, c. 22, sec. 11; 4 Kent's Com. 6; 2 Bla. Com. 114.

This author sets this doctrine in clear light. He says: "As the word 'heirs' is necessary to create a fee, so in further limitation of the strictness of feodal donation, the word 'body' or some other word of procreation is necessary to make it a fee-tail. If, therefore, the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate-tail, as if the grant be to a man, and his issue of her body, to a man and his seed, to a man and his children or offspring, all these are only estates for life, there wanting the words of inheritance."

The rule in Shelley's case, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, that always in such cases the word "heirs" are words of limitation and not of purchase: *Shelley's Case*, 1 Coke, 93; 4 Cru. Dig., c. 23, sec. 3, tit. 32, requires the use of the word "heirs" to bring it in operation.

No circumlocution has been ever held sufficient. It is believed no case can be found where this rule has been held to apply, unless the word "heirs" has been used in the second limitation.

Neither the researches of the learned judge who delivered the opinion of the supreme court, nor those of the very diligent counsel who argued the case here, have produced a case

decided in England or in any state of this Union abiding by the common law, where, in a conveyance by deed, the word "children" has been held to be equivalent to heirs. That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The reasoning of the supreme court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand *super antiquas vias, stare decisis*; to maintain the great rules of property, to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been than what it is.

I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.

Under this deed Mrs. Adams took an estate for life, which was not enlarged by the subsequent limitation to a fee-tail. The remainder vested in Anna Adams, the child of the marriage, for life, subject to open and let in after-born children to the same estate.

The deed operated as a covenant to stand seised. The proper and technical words of such a conveyance are, "stand seised to the use of," etc.; but any other words will have the same effect, if it appear to have been the intention of the parties to use them for that purpose. The words "bargain and sell, give, grant, and confirm," have been allowed so to operate: 4 Cru. Dig., tit. 32, c. 10, sec. 1, 2.

By such a covenant, an estate may be limited to a person not *in esse*, if within the considerations of blood or marriage: *Fearne on Remainders*, 288; *Chedington's Case*, 1 Coke, 154 a; 1 Preston on Estate, 172, 176; *Doe v. Martin*, 4 Term Rep. 39.

This deed, on the face of it, expresses the considerations of natural love and affection as well as the money consideration of one dollar.

It follows from these considerations that Adams is not entitled to curtesy in the lands on surviving his wife. The mortgage to Ross created no valid charge on the estate against Mrs. Adams, she being a minor when it was executed.

Mrs. Adams's interest in the land was subject to the provisions of the act for the better securing the property of mar-

ried women, passed March 25, 1852; the deed to her was after this act passed.

This was clearly a gift or grant within the meaning of the act. The legislature did not intend to limit the benefits of the act to property conveyed by a deed operating as a gift or grant; all the ordinary modes of acquiring property by deed were intended by the use of the terms "gift," "grant." The reasoning of Justice Vredenburg upon this point is conclusive. Upon the determination of the respective life estates, the land reverts to Miss Traphagen.

The judgment of the supreme court must be reversed. The money in court must be invested for the benefit of Mrs. Adams for life, and after her death, for the benefit of the surviving children of the marriage, in equal shares, during their respective lives, and at their deaths, respectively; their several shares must be paid to Miss Traphagen, or if she be then dead, to her heirs or devisees.

COMBS, GREEN, RISLEY, VAN DYKE, WOOD, CORNELISON, HAINES, and SWAIN, JJ., concurred in reversing the order of the supreme court.

COVENANTS OF TITLE CANNOT ENLARGE ESTATE, nor pass by estoppel a greater interest than that expressly conveyed: *Lounsbury v. Locander*, 25 N. J. Eq. 558; *Sisson v. Donnelly*, 36 N. J. L. 434, both citing the principal case.

WORD "HEIRS" IS NECESSARY TO CREATE ESTATE IN FEE-SIMPLE: *Leitendorfer v. Delphy*, 55 Am. Dec. 137; *Rector v. Waugh*, 57 Id. 251; compare *Gambrell v. Doe ex dem. Rose*, 44 Id. 73; *Gould v. Lamb*, 45 Id. 187. The principal case is cited in *Sisson v. Donnelly*, 36 N. J. L. 434, to the point that the word "heirs" is necessary in a conveyance to the creation of a fee-simple, and no expression of intention, in substituted terms, will have an equivalent effect.

ESTATE-TAIL, WHEN CREATED: See *Price v. Taylor*, 70 Am. Dec. 105, and note.

THE PRINCIPAL CASE IS CITED IN *Vanatta v. Brewer*, 32 N. J. Eq. 269, to the point that in the construction of a deed, the question is not what did the grantor intend to do, but what has he done by apt and proper words; and in *Huyler's Ex'rs v. Atwood*, 26 Id. 505, to the point that the words "gift" or "grant" found in the New Jersey statute, allowing a *feme covert* to acquire title to real estate by gift or grant, and to hold it as her separate estate, are not used in a purely technical sense, but were inserted to embrace all modes of acquiring land by deed.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

DANBURY v. ROBINSON.

[1 McCARTER, 212.]

ASSIGNEE OF MORTGAGE, WITH KNOWLEDGE OF FRAUD IN ITS INCEPTION, is not a *bona fide* purchaser, and the fact that he paid full consideration for the assignment will not aid him.

BURDEN OF PROVING THAT ASSIGNEE OF FRAUDULENT MORTGAGE IS NOT BONA FIDE PURCHASER for value, without notice of the fraud, is upon the defendant in a suit by the assignee to foreclose the mortgage.

TITLE OF BONA FIDE PURCHASER OF MORTGAGE MADE TO DEFRAUD CREDITORS of the mortgagor is valid, as against such creditors.

RIGHTS OF BONA FIDE PURCHASER FROM FRAUDULENT GRANTOR ARE NOT IMPAIRED by the fact that judgments were recovered by the creditors against the fraudulent grantor prior to the conveyance by the fraudulent grantee.

CONCEALED DEFECT OR SECRET EQUITY ARISING FROM CONDUCT OF PREVIOUS OWNERS OF PROPERTY, of which the purchaser had no notice, cannot be set up against him.

BILL to foreclose a mortgage. The opinion states the case.

***Strong*, for the complainant.**

***H. V. Speer*, for the defendants.**

By Court, GREEN, Chancellor. The bill is filed to foreclose a mortgage for one thousand dollars, given by William Robinson to Andrew Robinson, and by him assigned to the complainant. The mortgage was executed and recorded on the 1st of October, 1856, and was assigned to the complainant on the 11th of June, 1857, to secure the sum of five hundred dollars, and by a subsequent assignment acknowledged and recorded on the 9th of November, 1859, for the further con-

sideration of five hundred dollars, was unconditionally assigned to the complainant.

After the recording of the mortgage, but before its assignment to the complainant, judgments were recovered against the mortgagor, and the mortgaged premises levied upon by virtue of executions issued thereon. On the 21st of January, 1861, the premises were sold by virtue of these executions, and were subsequently conveyed to William Dunham, the purchaser at the sheriff's sale. Answers are filed by one of the judgment creditors and by the purchaser at the sheriff's sale, alleging fraud in the inception of the mortgage, knowledge of the fraud by the assignee, and want of consideration for the assignment.

The answers allege, and the evidence proves, that the bond and mortgage in their inception were fraudulent. They were given without consideration for the purpose of protecting the mortgagor's property from his creditors. The fact is proved by the express testimony of the mortgagor and mortgagee, whose evidence in this particular is uncontradicted. Upon this point there is no controversy.

The answers further allege that the complainant took the assignment with full knowledge of the fraud, and without paying any consideration therefor. The complainant claims to be a *bona fide* purchaser for value without notice of the fraud. The burden of proof is upon the defendants. The mortgagor testifies that, prior to the assignment, he informed the complainant that the mortgage was given to protect his property from his creditors, and that the assignment was purely voluntary. Both facts are expressly denied by the complainant in his evidence. It is clearly shown that at the date of the first assignment, which was in the nature of an hypothecation of the mortgage to secure the payment of five hundred dollars, the complainant gave to the assignor his check upon the state bank at New Brunswick for five hundred dollars; that on the same day the check was presented and paid to the assignor, and by him paid to the mortgagor. The mortgage thus assigned was held by the complainant as security for the five hundred dollars advanced until the 9th of November, 1859, and one year's interest paid on the sum advanced. At or about the time of the absolute transfer of the mortgage, it is shown that Danbury, the complainant, became security to Stout and Company for the further sum of five hundred dollars, for goods to be furnished to the mortgagor. Upon the faith of this guaranty, goods to the amount of \$497 were furnished to

Robinson, and the amount paid by the complainant. The account given by the complainant of the transaction is, that the first sum of five hundred dollars was advanced by him upon the understanding that out of that sum he should be paid a debt due him from Robinson, the mortgagor, of one hundred dollars, which was the inducement for the loan, and that the balance was applied for and taken by Robinson, to enable him to go into business after his failure; and that the second advancement, sixteen months afterwards, was made at Robinson's request to enable him to continue his business. All the circumstances tend to corroborate the truth of this statement. It is shown that, soon after the first assignment a shop was fitted up in Robinson's house, and business transacted there in the name of his son, and that at the date of the second assignment he obtained credit to the amount of five hundred dollars, in the transaction of his business, upon the faith of the complainant's guaranty. The conduct of the parties and the terms of the assignments are strictly in accordance with this view of the case. Both assignments were acknowledged and immediately recorded. The second assignment is absolute. The first assignment is conditional, and drawn with great particularity. It recites that five hundred dollars is due from the assignor to the assignee for money lent, which, by agreement between the parties, was to be repaid on the 1st of May, in five successive years, with interest for the first year on five hundred dollars, and annually thereafter on the amount remaining unpaid, with the privilege, on the part of the assignor, of paying the entire amount at his option at any time before the last installment became due. It further provides that in case Danbury collected the money due on the mortgage, he should, after paying the five hundred dollars advanced by him, with all costs and charges, pay the surplus, if any, to the assignor. This arrangement gave the control of the mortgage and perfect security to the assignee. It protected the interests of the assignor. It gave ample time and opportunity to the party for whose benefit the loan was made to repay the loan out of the proceeds of the business. This is precisely such an arrangement as would naturally have been made by the parties if acting in good faith, each desirous of protecting his own interest. It would scarcely have been resorted to if the whole transaction was a sham. The only explanation that Robinson gives of it is, that it was all devised the more effectually to cloak the fraud. This is possible, but

highly improbable. The evidence satisfactorily establishes the fact that the complainant advanced the full amount of the mortgage debt as a consideration for the assignment.

Was the complainant a *bona fide* purchaser without notice of the fraud? If he was not, if he took the assignment with knowledge of the fraud, the fact that he paid full consideration will not aid him. Robinson swears that Danbury had express notice of the fraud; that he told him, before either of the assignments were executed, that the mortgage was made without consideration for the purpose of protecting the property of the mortgagor from his creditors. This Danbury denies, and testifies that he never heard or knew of the fraud until Danbury was about to make sale of Robinson's property under execution, long after the last assignment. The fact was then for the first time made known to him by Robinson, and disclosure was threatened if Danbury persisted in pressing his execution. Upon which side of this conflicting statement lies the probability? If the assignment to Danbury was purely voluntary, if he accepted the assignment for Robinson's benefit merely to aid him in defrauding his creditors, it is highly probable that Robinson informed him of the real truth of the case. He must have done so to have given Danbury an inducement for his conduct. But the fact is established that Danbury advanced a full consideration for the mortgage; that he took the assignments as security for the moneys advanced, and that they were made and placed upon record at the time of making the loans. It is not probable, while Robinson was seeking to obtain from Danbury a loan, and offering him security for its repayment, that he would have told him that the security offered was fraudulent and worthless.

The evidence is not sufficient to impeach the title of the complainant as a *bona fide* purchaser of the mortgage without notice of the fraud.

It is further urged that if the complainant be a *bona fide* purchaser of the mortgage without notice, his title is nevertheless invalid as against the creditors of the fraudulent mortgagor. It was so held by the supreme court of Connecticut, in *Preston v. Crofut*, 1 Conn. 527; and by Chancellor Kent, in *Roberts v. Anderson*, 3 Johns. Ch. 371. These cases distinguish between the operation of the statute of 27 Eliz., c. 4, intended to protect *bona fide* purchasers, and the statute of 13 Id., c. 5, made to protect creditors. They admit that under the latter statute a purchaser for a valuable consideration without

notice from a fraudulent grantee will be preferred to a subsequent purchaser for a valuable consideration from the grantor. The first purchaser has in such case the preference, whether he takes from the fraudulent grantor or grantee. But they maintain that under the latter statute a *bona fide* purchaser without notice from a fraudulent grantee acquires no title by the conveyance against the creditors of the fraudulent grantor. The distinction is not well founded.

The decision of the chancellor in *Roberts v. Anderson*, 3 Johns. Ch. 371, was unanimously reversed by the court of appeals, and the distinction made by the chancellor in the construction of the two statutes declared to be without foundation: *Anderson v. Roberts*, 18 Johns. 515 [9 Am. Dec. 235].

The subject is very fully examined by Chief Justice Spencer, in delivering the opinion of the court of appeals, and has been elaborately discussed and definitively settled in numerous other cases: *Bean v. Smith*, 2 Mason, 252; *Somes v. Brewer*, 2 Pick. 198 [13 Am. Dec. 406]; *Oriental Bank v. Haskins*, 3 Met. 332 [37 Am. Dec. 140]; *Green v. Tanner*, 8 Id. 422; *Dugan v. Vattier*, 3 Blackf. 245 [25 Am. Dec. 105].

"It is now the settled American doctrine that a *bona fide* purchaser for valuable consideration is protected under the statutes of 13 and 27 Elizabeth, as adopted in this country, whether he purchases from a fraudulent grantor or a fraudulent grantee; and that there is no difference in this respect between a deed to defraud subsequent creditors and one to defraud subsequent purchasers. They are voidable only, and not absolutely void": 4 Kent's Com. 464.

The rights of the *bona fide* purchaser from the fraudulent grantee are not impaired by the fact that judgments were recovered by the creditors against the fraudulent grantor prior to the conveyance by the fraudulent grantee. The judgments constitute no lien upon the legal title of the grantee. The title acquired by the purchaser, according to every legal test, was perfect. A concealed defect or secret equity arising from the conduct of those who previously owned the property, of which the purchaser had no notice, cannot be set up against him: *Fletcher v. Peck*, 6 Cranch, 133; *Anderson v. Roberts*, 18 Johns. 531 [9 Am. Dec. 235].

The complainant is entitled to a decree according to the prayer of his bill. A reference will be ordered to ascertain the amount due upon the mortgage.

PURCHASER WITH NOTICE, THOUGH FOR FULL CONSIDERATION, IS NOT BONA FIDE: See *Warner v. Whittaker*, 72 Am. Dec. 65, and note 68.

BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION WITHOUT NOTICE IS PROTECTED as to his title, whether he purchases from a fraudulent grantor or a fraudulent grantee: *Newlin v. Osborne*, 72 Am. Dec. 566, and note citing prior cases 568; *Wyc v. Dandridge*, Id. 149, and note 152.

ASSIGNEE OF MORTGAGE WITHOUT NOTICE TAKES IT SUBJECT to all the equity of the mortgagor, but not to any secret equity of a third person against the assignor: *Mott v. Clark*, 49 Am. Dec. 566, and note 572.

THE PRINCIPAL CASE IS CITED to the point that while a purchaser for value of a chose in action is bound by the equities existing against it in the hands of the original obligor, he is not bound by the latent equities in favor of third parties of which he had no notice: *Putnam v. Clark*, 29 N. J. Eq. 415; and that a concealed defect or secret equity arising from the conduct of those who previously owned the property of which the purchaser had no notice, cannot be set up against him: *Fredenburgh v. Burnet*, 31 Id. 231; *Appleton v. Small*, Id. 384.

NEWMAN v. LANDRINE.

[1 MCCARTER, 291.]

RIGHT OF DEFENDANT IN EQUITY TO REQUIRE SECURITY FOR COSTS from the complainant who is resident abroad, does not rest upon the provisions of the statute alone. It is an ancient and well-established rule that on the application of the defendant the court will order such a complainant to give security for costs, and in the mean time will direct all proceedings to be stayed.

TO ENTITLE DEFENDANT IN EQUITY TO ORDER REQUIRING COMPLAINANT TO GIVE SECURITY FOR COSTS, it is not necessary that the complainant should reside out of the state at the time of filing his bill; it will be granted if the complainant goes abroad to reside after the commencement of the suit.

DEFENDANT IN EQUITY WAIVES RIGHT TO REQUIRE SECURITY FOR COSTS FROM NON-RESIDENT COMPLAINANT by taking any step in the cause after notice of the non-residence.

AFFIDAVIT ON APPLICATION FOR ORDER REQUIRING COMPLAINANT IN EQUITY TO GIVE SECURITY FOR COSTS on the ground of his removal from the state since the commencement of the suit, must show clearly that the defendant was not aware of the removal at the time of taking the last step in the cause.

AFFIDAVIT NOT TAKEN PURSUANT TO RULE OF COURT will be excluded as incompetent evidence.

MOTION by defendant for an order requiring the complainant to file security for costs on the ground that he had removed from the state after filing his bill.

Slaght, for the motion.

Borcherling, contra.

By Court, GREEN, Chancellor. The right of a defendant in equity to require from the complainant, who is resident abroad, security for the costs of the suit, does not rest upon the provisions of our statute. It is an ancient and well-established rule that if the complainant is resident abroad, the court, on the application of the defendant, will order him to give security for costs, and in the mean time will direct all proceedings to be stayed: 1 Daniell's Practice, 35; 1 Hoffman's Practice, 200.

Nor is it necessary, to entitle the defendant to the order, that the complainant should reside out of the state at the time of filing his bill of complaint. It will be granted, if the complainant goes abroad to reside after the commencement of the suit: *Anonymous*, 2 Dick. 776; *Weeks v. Cole*, 14 Ves. 517; *Dyott v. Dyott*, 1 Madd. 187; 1 Daniell's Practice, 36; 1 Smith's Practice, 558; 1 Hoffman's Practice, 200.

But if the fact of the non-residence of the complainant appear upon the face of the bill, or is known to the defendant, he must apply for security before answer or taking any other step in the cause. If after notice of non-residence the defendant takes any step in the cause, he thereby waives security for costs: *Meliorucchy v. Meliorucchy*, 2 Ves. Sen. 24; *Craig v. Bolton*, 2 Brown Ch. 609; *Dyott v. Dyott*, 1 Madd. 187; *Prior v. White*, 2 Molloy, 361; *Long v. Tardy*, 1 Johns. Ch. 202; *Goodrich v. Pendleton*, 3 Id. 520.

At the commencement of this suit, the complainant resided in the state. It so appears upon the face of the bill. He removed from the state to Connecticut, in November, 1861. The answer was filed on the 19th of November. On the 4th of February, 1862, the defendant obtained an order extending the rule for closing testimony. Whether the answer was filed before or after the complainant left the state is not clear, nor is it material. One step, at least, has been taken in the cause by the defendant since the complainant ceased to be a resident of the state. There are circumstances tending to show that the defendant had notice of the change of residence by the complainant before the making of the order on the 4th of February. The fact of notice is not denied by the defendant in his affidavit. He states that he supposed that the complainant was a resident of this state "until a short time since." He also states that on the twenty-first day of March he visited Connecticut, and found the complainant residing there upon a farm, and then learned that the complainant moved out of this

state into the state of Connecticut, and upon the said farm, in the month of November, A. D. 1861. All this may be true, and yet the defendant may have had notice before the fourth day of February that the complainant had removed from this state to reside elsewhere. Under the circumstances, there should have been a full and explicit denial, by the defendant, of notice of the complainant's change of residence at the time of taking the last order in the cause.

The affidavit on the part of the complainant, not having been taken pursuant to the rule of court, is excluded as incompetent evidence.

The motion is denied, costs to abide the event of the suit.

IT IS ANCIENT AND WELL-ESTABLISHED RULE that if the complainant in equity is resident abroad, the court will, on application of the defendant, order him to give security for costs, and in the mean time all proceedings will be stayed: *Biss v. Mount*, 28 N. J. Eq. 25, citing the principal case. But a defendant waives his right to security for costs when, after he has notice that the complainant is non-resident, he takes any step in the cause: *Shuttleworth v. Dunlop*, 34 Id. 492. A motion to rule the plaintiff to security for costs, on the ground of his insolvency, comes too late after the jury is sworn: *Wallace v. Collins*, 39 Am. Dec. 350. In ordinary actions, a justice of the peace has no power to require the plaintiff to give security for costs: *Gordon v. Ellison*, 74 Id. 353.

MARSH v. MARSH.

[1 MCCARTER, 215.]

VOLUNTARY SEPARATION BY WIFE FROM HUSBAND PENDING SUIT AGAINST HER FOR DIVORCE on the ground of adultery does not constitute willful desertion; because the legal presumption is that the separation took place by the procurement or with the assent of the husband, and because it is legally improper for the parties to cohabit during the pendency of such a suit.

ALLOWANCE TO WIFE FOR SEPARATE MAINTENANCE PENDING SUIT AGAINST HER FOR DIVORCE is made upon the principle that it would be improper for the parties to cohabit during the pendency of such suit, and without regard to the question whether or not she has been compelled to leave the house of the husband.

DESERTION IS QUESTION OF INTENTION, and any circumstances which render it necessary or proper that a wife should reside elsewhere than with her husband constitute a valid defense to a charge of desertion against her.

PETITION for divorce.

O. S. Halsted, for the petitioner.

Runyon, for the defendant.

By Court, GREEN, Chancellor. The petition in this cause, filed on the 26th of August, 1861, asks a divorce from the defendant on the ground of willful, continued, and obstinate desertion. The desertion is charged to have occurred in the month of March, 1858, and to have continued until the time of the filing of the petition. There is no dispute as to the material facts of the case. It appears from the evidence that, at the time of the alleged desertion, the petitioner and his wife were boarding together at No. 3 Fair Street, in the city of Newark; that she left the house of her own accord, she having employed a carman to remove her furniture in her husband's absence, and that she has since continued to reside separate and apart from him.

These facts are distinctly admitted by the defendant's answer, but the desertion is expressly denied. The separation of the wife from the husband is sought to be justified, in the defendant's answer, upon two grounds, viz.: 1. Because of the criminal misconduct of the husband; 2. Because, at the time of the alleged desertion, the husband had instituted proceedings in this court against her, to obtain a divorce on the ground of adultery, alleged to have been committed by her, and was thereby seeking to destroy her reputation and repudiate her as his wife. No satisfactory evidence is offered to sustain the charge of crimination against the husband. In support of the second ground of justification, it appears that a petition was filed in this court, by the husband, asking a divorce from the wife for the cause of adultery; that the petition was served upon the wife on the 23d of January, returnable on the 12th of February, and that on the 15th of February the answer of the wife was filed, denying the charge of adultery, and setting up, by way of recrimination, that he was guilty of adulterous intercourse, and further setting up, by way of defense, that at the time of filing the petition the wife occupied, and was at the time of her answer still occupying, the same apartments and bed with her husband, and that they, in all things, maintained the relations and intercourse of husband and wife. The bill in that case was dismissed by a final decree, made on the 4th of June, 1861, on the ground that the offense, if any had been committed by the wife, was fully condoned, the evidence showing that the marital relations and intercourse of the parties continued uninterrupted until up to and after the time of filing the petition, and until long after the alleged infidelity of the wife had been brought

to the knowledge of the husband. No opinion was expressed as to the guilt of either of the parties upon the crimination by the husband or recrimination by the answer of the wife. The only fact material to the present inquiry is, that from March, 1858, to the 4th of June, 1861, a period of more than three years, the alleged desertion of the wife consisted of a voluntary separation from the husband while proceedings, at his instance, were pending against her in this court for a divorce upon a charge of adultery, and that only about six months of the alleged desertion has continued since the decree in the former suit. Does a separation, under such circumstances, constitute a willful desertion in contemplation of law?

I am clear that it does not. On the contrary, a regard to public decency, as well as the settled usage of the court, requires that under such circumstances the parties should not live together.

The fact that the parties live under the same roof has been held to afford presumptive evidence of the continuance of the marital relations, and a condonation of the alleged adultery, at least as against the husband: *Beeby v. Beeby*, 1 Hagg. Ecc. 789; Shelford on Marriage and Divorce, 488.

The presumption must be, therefore, if the wife absent herself from his home pending a suit against her for adultery, that such separation is by his procurement or with his assent.

Where a bill has been filed against a wife, if she have no property of her own, and deny the truth of the charges against her, it is very much, of course, to make her an allowance, not only for the costs and expenses of litigation, but for her maintenance during the continuance of the suit. And this order is made without any regard to the question whether she has or has not been compelled to leave the house of the husband, the court regarding the institution of the suit as sufficient cause for a separate maintenance: Shelford on Marriage and Divorce, 533, sec. 86; *Earl of Portsmouth v. Countess of Portsmouth*, 3 Add. Ecc. 63; 2 Chitty's General Practice, 462; *Wood v. Wood*, 2 Paige 109 [28 Am. Dec. 451]; *Jones v. Jones*, 2 Barb. Cn. 146.

The allowance for separate maintenance is made upon the principle that it would be improper for the parties to cohabit during the pendency of such suit.

In *Sullivan v. Sullivan*, 2 Add. Ecc. 299, Sir John Nichol said that during the pendency of a suit to try the validity of the marriage, cohabitation was not incumbent by law on the

parties, or on either of them; it would even have been legally censurable, at least in the husband. And so when a suit is pending for a divorce, it is improper for the parties to cohabit together without reference to what may be the result of the suit: *Bishop on Marriage and Divorce*, sec. 569.

Desertion is a question of intention. It is the intent which constitutes the offense: *Marker v. Marker*, 11 N. J. L. 257.

If a husband, by his cruelty or misconduct, compels his wife to seek a home elsewhere than under his roof, she is not guilty of desertion. Any circumstances which render it necessary or proper that she should reside elsewhere than with her husband, is a valid defense to a charge of desertion.

The case established by the evidence constitutes no legal desertion.

1. Because where a wife separates herself from her husband pending a suit against her by her husband for divorce on the ground of adultery, the legal presumption is that such separation took place by the procurement or with the assent and approbation of the husband.

2. Because it is legally improper for the parties to cohabit together during the pendency of such suit.

The bill must be dismissed with costs.

ALIMONY PENDENTE LITE, AND GROUNDS ON WHICH IT IS ALLOWED: See note to *Methvin v. Methvin*, 60 Am. Dec. 665; also *Pinchard v. Pinchard*, 68 Id. 481; and *Bauman v. Bauman*, Id. 171, and notes.

ACTION FOR DIVORCE BY HUSBAND ON GROUND OF DESERTION cannot be maintained where it appears that the wife's abandonment was caused by unfounded accusations of unchaste conduct: *Hardin v. Hardin*, 52 Am. Dec. 170.

IT IS DUTY OF WIFE WHO SUES FOR DIVORCE to cease cohabitation with her husband until the termination of the suit: *Chapman v. Chapman*, 28 N. J. Eq. 395, citing the principal case.

VANORDEN v. JOHNSON.

[1 MCCARTER, 376.]

EQUITY WHICH ENTITLES SECOND MORTGAGEE TO BENEFIT OF RELEASE BY FIRST MORTGAGEE of a portion of the mortgaged property not covered by the second mortgage arises only where the first mortgagee gave the release with knowledge of the existence of the second encumbrance.

RECORDING OF SECOND MORTGAGE WILL NOT OPERATE AS CONSTRUCTIVE NOTICE of its existence to a prior mortgagee, so as to make a release by the latter of property not covered by the second mortgage inure to the benefit of the second mortgagee.

CLAIM OF SECOND MORTGAGEE TO BENEFIT OF RELEASE BY PRIOR MORTGAGEE is a mere equity, resulting from the fact that his security is impaired by the giving of the release, and will not be allowed, unless upon principles of justice and equity it ought thus to operate; and where the security of the second mortgagee is not impaired by the release, no equity will accrue in his favor.

BILL in equity. The opinion states the case.

Chandler, for the complainant.

S. S. Morris and Tittsworth, for the defendants.

By Court, **GREEN**, Chancellor. The complainant's mortgage covers three lots (Nos. 147, 148, and 149), at the corner of Littleton Avenue and Cabinet Street, in the city of Newark. It was executed on the 12th of April, 1858, by Johnson and wife to Anne E. Loomis, now the wife of the complainant. On the 2d of April, 1858, Johnson and wife executed to Peter Mead a mortgage upon lots Nos. 145, 146, 147, 148, 149, to secure the payment of six hundred dollars. This mortgage having been duly registered, was assigned by Mead to Bolles, one of the defendants, on the 8th of April, 1858. On the 16th of July, 1858, Bolles released to Johnson lot No. 145 from the operation of his mortgage.

There is no dispute as to the facts. The priority of Bolles's mortgage is admitted. The only point raised by counsel upon the argument is that Bolles, the first mortgagee, having released one of the lots included in his mortgage, but not covered by the second mortgage, to the prejudice of the second mortgagee, the release operates in equity as a discharge *pro tanto* of the lots included in the second mortgage. The general principle is well settled, but the complainant cannot, in this case, avail himself of its benefit.

1. The equity which entitles the second mortgagee to the benefit of the release executed by the first mortgagee, arises only where the first mortgagee gave the release with knowledge of the existence of the second encumbrance. If the release is executed without notice of existing equities on the part of the subsequent encumbrancer, he is not responsible for the consequences of his act, nor is the lien of his mortgage in any wise impaired: *Stevens v. Cooper*, 1 Johns. Ch. 425 [7 Am. Dec. 499]; *Guion v. Knapp*, 6 Paige, 43 [29 Am. Dec. 741]; *Patty v. Pease*, 8 Paige, 277 [35 Am. Dec. 683]; *Reilly v. Mayer*, 12 N. J. Eq. 59.

And the recording of the second mortgage will not operate

as constructive notice of its existence to the prior mortgagee: *Cheesebrough v. Millard*, 1 Johns. Ch. 414 [7 Am. Dec. 494]; *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Blair v. Ward*, 10 N. J. Eq. 126.

There is no intimation, either in the pleadings or in the evidence, that Bolles, at the date of the release to Johnson, had any knowledge whatever, actual or constructive, of the existence of the complainant's mortgage. It must be assumed that the release was executed by Bolles in good faith, without knowledge of any existing equity on the part of the complainant.

2. But there is, in this case, another and equally decisive reason against the equity claimed by the complainant. The mortgage of Bolles was originally given to secure six hundred dollars. Only four hundred dollars were advanced upon it. An indorsement was made upon the bond by the mortgagee, prior to its assignment to Bolles, that four hundred dollars only had been advanced; that two hundred dollars remained to be paid, and that the mortgage was to stand as security only for what was actually paid with interest. It further appears, by the evidence, that at the time of the delivery of the bond and mortgage there was an agreement between the mortgagor and mortgagee, that if the remaining two hundred dollars was not advanced, one of the lots mortgaged should be released. In pursuance of this agreement, the release was subsequently executed by Bolles, without any consideration received by him therefor. It is manifest, not only that the release was given in good faith, but that no equity did or could result therefrom in favor of the second mortgagee. His rights were in no wise prejudiced. The original mortgagor was entitled to a further advance of two hundred dollars upon the first mortgage. Bolles was bound in equity either to advance the money or execute the release. If the money had been advanced, it would have constituted a valid encumbrance prior to the complainant's mortgage. He had notice by the registry that there was an existing encumbrance upon the premises covered by his mortgage of six hundred dollars. The lot released was of less value than two hundred dollars. The second mortgagee was, therefore, benefited by the release of the lot, instead of the additional advance of two hundred dollars. The claim of the complainant to the benefit of the release is a mere equity resulting from the fact that his security is impaired by the giving of the release. It is no technical discharge of the lands

covered by the complainant's mortgage, nor will it operate as a release, unless upon principles of justice and equity it ought thus to operate. Thus, where the land released is sold at a fair price, and the purchase-money is applied in part satisfaction of the first mortgage, no equity will accrue in favor of the second mortgagee, because it is obvious that his interests are in no wise prejudiced by the release: *Patty v. Pease*, 8 Paige, 277 [35 Am. Dec. 683].

The claim of the second mortgagee, being a mere equity, can be extended no further than is required by the clear demands of natural justice and equity.

The entire premises covered by the complainant's mortgage cannot, under the pleadings in the cause, be directed to be sold. All the equity to which the complainant is entitled under the case as it now stands is, that the complainant, upon the payment of Bolles's claim, shall be substituted in his place, with all his rights as against the premises covered by the first mortgage. This assignment Bolles, in his answer, proffers himself ready and willing to make. Upon general principles of equity, the complainant is entitled to the benefit of such subrogation.

Leonard, the purchaser of the lot released, and in whose favor the release operates, cannot be affected by any equities subsisting between the mortgagees: *Reilly v. Mayer*, 12 N. J. Eq. 59.

He is entitled to the costs of his defense.

EQUITY OF SUBSEQUENT PURCHASERS AND ENCUMBRANCES, where prior mortgagee releases with notice portion of his security: See *Gaskill v. Sine*, 78 Am. Dec. 105, note 107. The principal case is cited to the point that the equity which entitles a second mortgagee to the benefit of a release executed by a prior mortgagee arises only where the first mortgagee gave the release with a knowledge of the existence of a second encumbrance: *Hoy v. Bramhall*, 19 N. J. Eq. 571; *Ward's Ex'rs v. Hague*, 25 Id. 398; *Hill's Adm'rs v. McCarter*, 27 Id. 47; but if the release is given with notice of a subsequent mortgage or deed of the premises and will be prejudicial to the subsequent mortgagee or grantee, it will operate as a discharge of the prior mortgagee's lien to the extent of the value of the land released: *Cogswell v. Stout*, 32 Id. 241.

MORTGAGEE IS NOT BOUND TO INQUIRE AS TO SUBSEQUENT ALIENATION or encumbrance before releasing portion of land, and unless he had actual or constructive notice thereof before the execution of the release, his security will not be impaired: *Howard Ins. Co. v. Halsey*, 59 Am. Dec. 478. The principal case is cited to the point that the recording of the subsequent mortgage will not operate as constructive notice of its existence to the prior mortgagee: *Ward's Ex'rs v. Hague*, 25 N. J. Eq. 398; *Cogswell v. Stout*, 32 Id. 242.

CODINGTON v. MOTT.

[1 MCCARTER, 430.]

AMENDMENTS ARE ALLOWED IN EQUITY WITH GREAT LIBERALITY.**FORMAL AMENDMENTS AS INTRODUCTION OF NECESSARY PARTIES** and amendments in the prayer of the bill to meet the exigency of the case will be made up to and after the final hearing.**MATERIAL AMENDMENTS IN EQUITY, AS GENERAL RULE, SHOULD BE APPLIED FOR AND MADE** before the cause is at issue.**AMENDMENT SEEKING TO MAKE NEW CASE** inconsistent with that made by original bill, if permissible at all, must be made before the cause is at issue, and before a sworn answer has been filed.**APPLICATION TO AMEND BILL FOR SPECIFIC PERFORMANCE OF CONTRACT** by charging the contract to be fraudulent, and praying that it be declared void, will not be granted after the cause is at issue and the time limited to close testimony has expired.**PROPER PRACTICE WHERE COMPLAINANT HAS MISTAKEN HIS CASE** is to dismiss the bill without prejudice to a new bill.**APPLICATION TO AMEND BILL SHOULD BE PROMPTLY MADE** after the discovery of the facts upon which it is based.**APPLICATION to amend bill.** The opinion states the case.*Ransom*, for the motion.*Williamson*, contra.

By Court, GREEN, Chancellor. The bill in this cause was filed to enforce the performance of a contract for the exchange of real estate, entered into between the complainants and Mott, one of the defendants, on the 19th of June, 1861. The bill alleges that by the agreement, the deeds for the exchange of the said real estate were to be delivered on or before the twenty-second day of July, 1861; that within the time limited for the exchange of said deeds, a deed was delivered for the land to be conveyed by the complainants pursuant to the agreement, and that, for the land to be conveyed by Mott, a deed was executed and delivered by Bull to the agent of the complainants; but that, as complainants afterwards discovered, the deed was executed in blank, and the names of the complainants afterwards inserted as grantees, without the authority of Bull, by reason whereof the deed is void, and conveys no title to the grantees. The bill prays that Mott may be decreed specifically to perform his contract, and to procure a valid deed for the premises to be executed to the complainants in pursuance of his agreement, or in default thereof that he be decreed to reconvey the premises conveyed to him by the complainants. The present motion is to amend the bill, by inserting therein a charge that at the time of the contract, false and fraudulent

representations, as to the value of the property, were made by the agent of Mott, by striking from the bill the prayer for specific performance, and inserting therein a prayer that the contract be declared fraudulent and void.

The motion must be denied. Amendments are made in equity with great liberality. They are, in fact, made at every stage of the proceedings wherever the substantial ends of justice will be thereby promoted. But the indulgence has its limitations, although, from the very nature of the case, it is difficult to fix the precise line beyond which the court, in the exercise of its discretion, will not go. Any imperfection in the frame of the bill may thus be remedied as often as occasion shall require. Thus, to enable the court to do complete justice, new matter existing at the time of filing the bill may be inserted, new parties added, irrelevant matter stricken out, and unnecessary parties omitted: Story's Eq. Pl., sec. 885; 1 Daniell's Ch. Pr. 469.

As a general rule, material amendments should be applied for and made before the cause is at issue: Redesdale's Treat. (by Jeremy), 55, 822; Cooper's Eq. Pl. 838; Story's Eq. Pl., sec. 832, 886.

But formal amendments, and the introduction of necessary parties and amendments in the prayer of the bill, to meet the exigency of the case, will be made up to and after the final hearing: 1 Daniell's Ch. Pr. 489, 440.

It would seem as well from the reported cases as from the language of our rules, that the privilege of making material amendments has little if any restriction, if made before a sworn answer is filed or issue joined. Thus in *Mavor v. Dry*, 2 Sim. & St. 113, the plaintiff, by his original bill, sought to set aside a deed. Under the usual order, he amended his bill by making a different case, and sought to establish the deed: Rules 10, sec. 1.

In *Buckley v. Cores*, 1 N. J. Eq. 504, the bill was filed by a purchaser at a sheriff's sale of land, on which the defendant held a mortgage. As originally filed, the bill charged that the complainant had an absolute title to the premises older than the defendant's mortgage; but that, under the belief that the mortgage was prior to the judgment under which he purchased, he had agreed to pay it, and had paid large sums on account. He thereupon prayed for an account of the moneys thus paid. The answer, alleging that the defendant's mortgage was in fact prior to the complainant's title, denied the

equity of the bill, and the injunction was dissolved. After the dissolution, the complainant had leave to amend his bill, and it was amended by making it a bill to redeem the defendant's mortgage, and a new injunction granted by the injunction master in the absence of the chancellor. A motion was made to dissolve the injunction, upon the ground, among others, that the amendment was unwarranted by the practice of the court. The motion to dissolve was denied. But the chancellor expressed doubts as to the extent of the amendment. It is obvious, indeed, that his conclusion was reached rather from a belief that the ends of substantial justice were thereby attained than from conviction of the propriety of the amendment, and that if the matter had been presented to him originally upon a motion to amend, it would not have been permitted.

In *Philhower v. Todd*, 11 N. J. Eq. 54, S. C., Id. 812, after hearing upon a motion to dissolve the injunction, and the delivery of the opinion of the court that the injunction should be dissolved, and the bill dismissed for want of equity, the injunction was retained, and the party permitted to amend by altering the frame and averments of his bill.

In *Henry v. Brown*, 8 N. J. Eq. 245, which was also an injunction bill, the complainant was allowed to amend her bill, after the testimony was closed, and after the final hearing, by adding a new party, by changing the prayer for relief, and by so amending the frame of the bill that the proper relief could be administered. But it does not seem that in either of these causes the complainant was permitted to make a new case.

These cases show that the practice of amending injunction bills after answer and after argument has obtained in this state, and that the indulgence has been granted more freely than has been approved elsewhere: *Rodgers v. Rodgers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Id. 67; *Verplanck v. Mer. Ins. Co.*, 1 Edw. Ch. 47.

But without questioning the propriety of either of these decisions, neither of them, nor any one of the cases cited upon the argument, is an authority to support the present application. The cause is at issue, the replication having been filed on the 8th of February last. The time limited by the rule to close testimony has expired. The presumption therefore is, that the evidence has been taken, though this fact does not otherwise appear, nor do I deem it material. The party now asks to amend his bill, not by introducing new parties, nor amend-

ing the prayer for relief, nor altering the averments and frame of the bill touching the original ground of complaint, nor introducing such new facts as may enable the court to do full justice to the parties upon the case originally made, but by making a new case totally inconsistent with that made by the bill as originally framed. The bill affirmed the contract, and asked a specific performance. The complainant now asks to amend by charging that the contract is fraudulent, and asking that it may be declared void. If this is proper under the usual order to amend before answer, it cannot be done after issue joined. It is making a new case, which will not be permitted at this stage of the cause. In *Deniston v. Little*, 2 Schoales & L. 11, note, Lord Redesdale said: "I know of no case which allows an amendment in order to enable the party to make a new case." And although there are cases where it has been permitted before the cause is at issue, and before a sworn answer has been filed, yet even then its propriety has been questioned, and at a later stage of the cause has not been allowed: *Smith v. Smith*, Cooper t. Eldon, 141; *Verplanck v. Mer. Ins. Co.*, 1 Edw. Ch. 47; *Pratt v. Bacon*, 10 Pick. 123; 1 Daniell's Ch. Pr. 466, 467.

The proper practice where the complainant has mistaken his case is to dismiss the bill without prejudice to a new bill: Daniell's Ch. Pr. 440, and cases there cited.

There are other objections urged to allowing the application for amendment.

The title deed and possession of the premises in question was delivered in July, 1861. The bill was filed on the 26th of October, 1861. The affidavit on which the petition for leave to amend is founded states that, since the filing of the bill, the complainants have discovered that the representations made by the agent of the defendant as to the value of the premises were false and fraudulent. That may be true, and yet the discovery may have been made nearly nine months since. It is certainly remarkable if the complainants have remained in possession of the premises nearly a year without discovering their true value. The application to amend should have been promptly made. Though no injunction was issued, notice of the pendency of the suit is a restraint upon alienation, and must operate prejudicially to the rights and interests of the defendant.

If the alleged fraud consists in a mere false assertion of value, either by the grantors themselves or by their agent,

this constitutes no ground of relief to the purchaser: 2 Kent's Com. 485. But the false assertion of value as set out in the petition is coupled with and confirmed by a statement of facts by the agent, which is also charged to be false and fraudulent. This may vary the rights of the complainants, and lay the foundation for a title to relief. The principal is clearly liable *civiliter* for the fraud of his agent, and any fraud or misrepresentation by the agent affects the rights of the principal to recover: Paley on Agency, ed. 1847, 801, 825; *Herr v. Nicholls*, 1 Salk. 289; *Sandford v. Handy*, 23 Wend. 280; *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206]; *North River Bank v. Ayman*, 3 Hill, 262.

It is not necessary to decide the last point. If the complainant has title to redress on that ground, he may obtain it by filing a new bill.

The motion is denied.

AMENDMENTS CHANGING CAUSE OF ACTION, WHEN ALLOWED: See *Miles v. Ventura*, 79 Am. Dec. 477, and cases cited in the note 482; *Blackwell v. Blackwell*, 70 Id. 556; *Lee's Adm'r v. Lee*, 64 Id. 247.

AMENDMENTS ARE NOT GENERALLY ALLOWABLE IN EQUITY IF PARTIES ARE AT ISSUE and witnesses have been examined: *Dow v. Jacell*, 45 Am. Dec. 371. But new parties may be brought in at any time: *Id.* The allowance of amendments is, however, discretionary with the court: *Truly v. Lane*, 45 Id. 305.

BILL FOR SPECIFIC PERFORMANCE MAY BE AMENDED TO ASK RESCSSION, together with other relief, in a suit on a contract to exchange lands where it appears on the trial that the defendant cannot make title. The foregoing is held in *Perrill v. McKinley*, 58 Am. Dec. 212, which is approved and followed in *Bellon v. Apperson*, 26 Gratt. 217.

CRUM v. MOORE'S ADMINISTRATOR.

[1 MCCARTER, 496.]

ADMINISTRATOR MAY, AS GENERAL RULE, SUBMIT CLAIMS AGAINST ESTATE to award of arbitrators.

EQUITY WILL ENJOIN ADMINISTRATOR FROM SUBMITTING CLAIM AGAINST ESTATE TO ARBITRATION without the consent and against the interest of the parties interested, where the estate is virtually settled and he occupies the attitude of a trustee of a fund claimed by two contending parties.

COURT WOULD RELUCTANTLY INTERFERE WITH DISCRETION OF ADMINISTRATOR TO REFER CONTROVERSY TO ARBITRATION in the ordinary course of administration, where the rights of various parties are involved.

ADMINISTRATOR WHO SUBMITS CLAIM AGAINST ESTATE TO ARBITRATION IS BOUND by the award, and may enforce performance against the other party.

PARTIES INTERESTED IN ESTATE ARE NOT BOUND BY ADMINISTRATOR'S SUBMISSION TO ARBITRATION of claims against the estate; and if upon the submission of a debt due the estate the arbitrators award less than is really due, the administrator shall answer for the full amount of the debt. It amounts to a *devastavit* by the administrator to the extent of the loss.

TRUSTEE WILL NOT BE PERMITTED TO PREJUDICE RIGHTS OR INTERESTS OF CESTUI QUE TRUST by submission to arbitration, and if it be made without the approbation of the *cestui que trust* he will not be bound.

PERSONAL LIABILITY OF ADMINISTRATOR TO CESTUI QUE TRUST, IN CASE OF INCORRECT AWARD, cannot be urged by him in defense to an application by the *cestui que trust* for an injunction restraining him from making a submission to arbitration, for such an award may, and in many cases must, operate to the prejudice of the *cestui que trust*.

EQUITY WILL ENJOIN TRUSTEE FROM SUBMITTING TO ARBITRATION, without the consent and against the will of the *cestuis que trust*, a question in which they alone are interested.

ADMINISTRATOR WILL BE ENJOINED FROM SUBMITTING TO ARBITRATION the claim of one heir against the estate without the consent of the other heir, where it is peculiarly proper, from the nature of the claim, that it should be submitted to a court for determination, and where the administrator has assumed an attitude hostile to the interests of the complaining heir.

MOTION to dissolve an injunction issued in this suit brought by Crum and wife against Daniel Moore's administrator and Daniel Moore, Jr.

Bird, G. A. Allen, and Van Fleet, for the motion.

Van Syckel and Werts, contra.

By Court, GREEN, Chancellor. The bill in this cause was filed to restrain an administrator with the will annexed from submitting a claim against the estate of the testator to the decision of arbitrators. The testator left two children, the wife of the complainant, and Daniel Moore, Jr., the defendant, each of whom is entitled to a moiety of the estate after the payment of debts. Crum and Moore were appointed executors; but being unable to settle the estate, they were, by consent, both removed from the executorship, and Thatcher was appointed administrator. The debts have all been paid (with the exception of a claim of Moore for over two thousand three hundred dollars, which is disputed), leaving in the hands of the administrator about fourteen hundred dollars. To one half of this sum, if Moore's claim is not allowed, the wife of Crum is entitled. If the claim of Moore is allowed, the estate is insolvent, although with his assent the other creditors have all been paid in full. The whole controversy, therefore, is between the complainants, who claim one half of the funds in

the hands of the administrator, and Daniel Moore, who claims the entire fund as the creditor of the estate. The administrator is a mere trustee, having no interest whatever in the result.

The interference of the court was asked, and the injunction was allowed, on three grounds, viz.:—

1. That the agreement to submit to arbitration was made by the administrator without the consent and against the will of the complainants, who alone were interested to resist the claim.

2. That the agreement was made by collusion between the administrator and the claimant.

3. That two of the arbitrators selected were not impartial, owing to the relations subsisting between them and the parties to the controversy.

The first ground raises the inquiry, whether the administrator will be restrained, under the admitted circumstances of the case, from submitting the matter in controversy to arbitration, without the consent and against the will of the complainants, in the absence of fraud or collusion on the part of the administrator, or of partiality or other disqualification on the part of the arbitrators.

It is insisted, by the administrator, that he has an absolute right, by virtue of his office, irrespective of the interests or wishes of those interested in the estate, to submit any claim against the estate to arbitration. That an administrator may submit claims against the estate to the award of arbitrators will not, as a general rule, be questioned. So as a general rule, the plaintiff in an action at law may release the claim, or submit to a reference, or enter satisfaction of the judgment. But if he be in fact the mere trustee of another, having the legal title, but no beneficial interest in the matter in controversy, the court will control his action, and protect the interest of the *cestui que trust*. The books are full of cases upon this subject: *Legh v. Legh*, 1 Bos. & P. 447; *Winch v. Keeley*, 1 Term Rep. 619; *Henry v. Milham*, 13 N. J. L. 266; *Johnson v. Bloodgood*, 1 Johns. Cas. 51 [1 Am. Dec. 93]; *Wardell v. Eden*, 2 Johns. Cas. 121; S. C., 1 Johns. 531, note; *Littlefield v. Storey*, 3 Id. 425; *Briggs v. Dorr*, 19 Id. 95; *Timan v. Leland*, 6 Hill, 237. *Jackson v. Blodget*, 5 Cow. 202.

And the courts of common law exercise this power of protecting trusts and equities, though strictly a branch of equity jurisdiction, as essential to the ends of justice.

The real question, then, is not whether an administrator, as

such, has the right of submitting to arbitration claims against the estate; but whether circumstances may exist, and whether they do exist in this case, which will warrant the court in restraining the administrator in the exercise of his admitted power, where it is attempted to be exercised without the consent and against the interest of those really interested in the matter in controversy.

In the ordinary course of administration, where the rights of various parties are involved, the court would reluctantly interfere with the discretion of an administrator to refer a controversy to arbitration, if he chose voluntarily to incur the hazard of so doing. But there are no considerations of public policy which can in any wise interfere with the discretion of the court, where the estate is virtually settled, and the administrator occupies the attitude of a trustee of the fund claimed by two contending parties.

It is certainly a familiar doctrine that an administrator may lawfully submit claims against the estate to the award of arbitrators. So one man may submit for another, a husband for his wife, a parent for his child, a guardian for an infant, a trustee for his *cestui que trust*: Caldwell on Arbitration, 12.

And in all these cases the party to the submission is bound by the award, and may be compelled to perform it, or may enforce performance against the other party. But the party really interested, the wife, the infant, the *cestui que trust*, are not bound by the submission, nor can their rights be concluded by the terms of the award. Even in the case of a submission by an administrator, the parties interested in the estate are not bound. And if, upon the submission of a debt due the estate, the arbitrators award less than is really due, the administrator shall answer for the full amount of the debt: *Yard v. Eland*, 1 Ld. Raym. 369; Com. Dig., tit. Administration, I, 1; 2 Williams on Executors, 1533; Bac. Abr., tit. Executors, L, 1.

It amounts to a *devastavit* by the administrator to the extent of the loss.

It may be affirmed, as a universal principle, that a trustee will not be permitted to prejudice the rights or interests of his *cestui que trust* by a submission to arbitration. If the submission be made without the approbation of the *cestui que trust*, he will not be bound. It is an utter subversion of the whole theory and policy of arbitrations that a party's rights should be submitted to the decision of arbitrators not of his

own choosing. He is bound by the award, because it is a decision by a tribunal of the party's own choice, to whose judgment he has voluntarily submitted the adjudication of his rights. So far as I am aware, either under the common law or law of this state, no case can be found in which a party has been or can be compelled to submit to arbitration against his will, or in which he is bound by the award of arbitrators not of his own choice. He is entitled, as of right in all other cases, to have his rights determined by the appropriate judicial tribunals of the state. It is upon this ground that courts of equity will not decree the specific performance of an agreement to submit to arbitration, deeming it against public policy to exclude from the appropriate judicial tribunals of the state any persons who, in the ordinary course of things, have a right to sue there: 2 Story's Eq. Jur., sec. 1457.

But it is urged that, as the *cestui que trust* is not bound by the award, and may look to the trustee for indemnity, it cannot operate to his prejudice, and there can therefore be no ground for the interference of this court by injunction. The trustee, it is urged, remains personally liable, as though the award had not been made. It cannot escape observation that this is a remarkable ground to be taken by the trustee himself. It is very usual for trustees and all persons acting in a fiduciary capacity to decline any course of action which may make them personally responsible, and to resort to the direction of some judicial tribunal for protection; but here we find the trustee insisting on his being permitted to submit to arbitration on the very ground that he will thereby render himself liable.

But aside from this suggestion, it is obvious that although the *cestui que trust* is not bound by the award, it may, and in many cases must, operate to her prejudice. It is competent evidence to shield the administrator from the charge of a *devastavit* until the award is shown to be erroneous. It will completely shift the burden of proof between these contending parties. In an action brought against the administrator by the claimant, he must show that his claim is well founded. But in action by the legatee against the administrator for her share of the estate, she must show that the administrator has paid a larger amount than is justly due. The complainant, moreover, will be subjected by the arbitration to the burden and expense of a controversy which cannot be decisive of her rights.

I am of opinion, therefore, that equity will restrain by injunction a trustee from submitting to arbitration a question, in which the *cestuis que trust* alone are interested, without their consent and against their will. No discreet trustee, acting in good faith, would venture or desire to do it. The restraint would operate for his protection as well as that of the *cestui que trust*.

Aside from the general principle, there are circumstances in this case which render it peculiarly proper that the administrator should be restrained from proceeding with the arbitration. The very nature of the controversy renders it an unfit matter to be disposed of in a tribunal not sufficiently familiar with the principles of law and equity to administer either effectually in complicated cases. The claim is made by a son against the estate of his father for services for a period of more than twenty years. He has always resided with his father and upon the father's farm, from the time he was of age. He alleges, in his answer, that although his claim is thus ancient, no part of it is barred by the statute of limitations. It is obvious that this state of facts must of necessity give rise to questions of doubt and difficulty peculiarly proper to be disposed of by the constituted tribunals of justice.

The administrator has obviously assumed an attitude hostile to the interests of the complainants. This is fully evinced by the admissions and allegations contained in the answer. He alleges that he entered into the agreement to arbitrate the claim of Daniel Moore, Jr., against the estate, with the conviction that Daniel Moore, Jr., had just claims for some amount against the estate, though for what amount he does not pretend to say; that his sole object in accepting the letters of administration was to adjust the difficulties existing between the complainants and Daniel Moore, Jr., respecting the claims of said Moore without "lawing," and to prevent the whole estate from being squandered by litigation, which he believes to be the sole desire of the complainants; and that they only oppose the said arbitration because they well know that thereby all the said claims will be fairly and finally settled, and that no further chance of litigation will be allowed them. He admits that he accepted the letters of administration, at the solicitation of the complainants' attorney and of Moore, with full knowledge of the nature of the controversy; that afterwards, without apprising the complainants or their counsel of his purpose, and without taking counsel of them,

or of any other attorney as to the propriety of his course, or of its consistency with the rights of the complainants, or with his own duty in the matter, he entered into an agreement with Moore to submit the matter to arbitration. He admits that the preparation of the bond was intrusted to Moore's counsel, and that after the arrangement was completed, and not before, he apprised the complainants' counsel of the step he had taken, and requested him to furnish the names of the complainants' witnesses, and to assist him in making a legal and proper defense before the arbitrators. These statements of the defendant's answer sufficiently evince his attitude toward the respective parties. It is not surprising that, with a knowledge of these facts, the counsel of the complainants should have utterly refused to appear before the arbitrators or to have any participation in the proceedings of the administrator. Nor is it difficult to anticipate what the result of the arbitration will be if conducted under such auspices. The whole tone and spirit of the answer might well have been prompted, and its purport dictated by the claimant himself. He will scarcely find a stronger or a more willing witness to aid him in his claims upon the estate than the administrator to whose care the estate is intrusted, and who is bound to protect the rights of all the parties in interest. The allegations and charges of the answer are rather those of a party litigant or a partisan than of a trustee bound to protect the interests of his *cestuis qui trust*. Whether this course is prompted by honest but mistaken views of duty and of the complainants' rights, or of collusion with the defendant Moore, is quite immaterial as to its effect upon the rights of the complainants. It admits of no justification, and it would be a gross wrong to the complainants and a mockery of justice to permit the arbitration to proceed under such circumstances, however just and impartial the arbitrators may be.

No trustee should be permitted thus to deal with trust funds against the known wishes of his *cestuis que trust* and to the certain prejudice of their interests. I entirely concur in the sentiment of the senior counsel of the complainants, that it is a matter of surprise that any honest, honorable, and fair man should be willing to pursue such a course. The administrator may be correct in his views, that the claim of Daniel Moore, Jr., against the estate is just, and that the motives of the complainants are corrupt, and their conduct fraudulent in resisting the claim. Upon that point no opinion is designed to be

expressed. But it is very clear that those are questions which the complainants are entitled to have impartially tried and fairly decided; that the administrator has no right, whatever may be his views of the matter, to prevent a fair and impartial trial, and that this court is bound to use its power to secure, as far as may be, that end.

The motion is denied, but without costs. No fraud is imputed to Moore, the defendant, and I am willing to believe that the conduct of the administrator may have been prompted by mistaken views of his duty and of the complainants' rights, and am not, therefore, willing to condemn him in costs.

EXECUTORS AND ADMINISTRATORS MAY SUBMIT MATTERS TO ARBITRATION: *Ballou v. Dikworth*, 48 Am. Dec. 760, note 762; note to *Hutchins v. Johnson*, 30 Id. 632; *Konigsmacher v. Kimmel*, 21 Id. 374.

BANTA v. VREELAND.

[2 MCCARTER, 102.]

MORTGAGE CANCELED OF RECORD AND SURRENDERED UP, UNDER MISTAKEN IMPRESSION THAT IT HAD BEEN SATISFIED, will be decreed to be a subsisting lien on the mortgaged premises.

BILL in equity to foreclose two mortgages. The facts are stated in the opinion.

Zabriskie, for the complainant.

Gilchrist, for the defendant.

By Court, GREEN, Chancellor. The bill is filed to foreclose two mortgages upon the same premises. The first was given by Jacob C. Vreeland to Conrad Vreeland, dated the 13th of March, 1844, for three hundred dollars, and assigned to the complainant by the executor of the mortgagee. The second was given by Jacob C. Vreeland to the complainant, dated December 10, 1851, for \$628.11. In regard to the second mortgage, there is no dispute. The first mortgage was canceled of record, and the bond and mortgage surrendered by the complainant to the defendant on the 17th of October, 1860. The bill, which was filed a few days after the cancellation, alleges that this cancellation of the mortgage was made by the complainant under a mistaken apprehension that the mortgage had been satisfied, when in truth it had not. The truth of

this averment constitutes the material inquiry in the cause: Was that mortgage debt ever paid?

The mortgaged premises, on the 17th of November, 1856, were conveyed by Jacob C. Vreeland, the mortgagor, to his brother, Thomas B. Vreeland, the defendant. The mortgage was surrendered and canceled of record on the 17th of October, 1860. The evidence shows clearly that nothing was paid upon the mortgage, nor was it satisfied in any way by any act done, or arrangement made at the time of the cancellation. It was canceled under the belief that it had been paid long before. If so, when, how, and by whom was it paid? It would naturally have been paid either by the mortgagor himself, or by the defendant, who purchased the premises from the mortgagor. The defendant, by his answer, expressly admits that he never paid the mortgage debt, or any part of it, but alleges that he has been informed and believes that the debt was paid, or secured to be paid, or in some other way arranged, satisfied, and discharged, either by the mortgagee, the mortgagor, or by some other person, but when or how, the defendant has been unable to ascertain.

The bill charges that at the time of the conveyance of the mortgaged premises to the defendant by the mortgagor, the mortgage was unpaid, and a lien upon the premises; and that the defendant assumed the payment of the debt as a part of the consideration of the conveyance. This is expressly denied by the answer. The direct issue thus made by the pleadings is, whether the mortgage in controversy was a subsisting lien upon the mortgaged premises at the time they were conveyed to the defendant. If it was, we have his explicit acknowledgment that it has not since been paid.

The mortgaged premises were conveyed to the defendant on the 17th of November, 1856. The cancellation was made on the 17th of October, 1860. If the debt was paid before, or at the time of the conveyance, the bond and mortgage would then, in the usual course of business, have been delivered up and canceled. But they remained in the hands of the complainant for four years afterwards in full force, unquestioned either by the obligor in the bond, or by the defendant, who owned the mortgaged premises. If paid, it must have been by the obligor, or with his knowledge. He has been examined. He is a brother of the defendant, and has no apparent motive to color or distort the evidence against him. He testifies that there were two mortgages on the property when he conveyed

to the defendant. The first was a three-hundred-dollar mortgage, executed by his mother and himself, given in 1844 or 1845, and assigned by him as the executor of the mortgagee, to the complainant. This is the mortgage in controversy. He distinctly admits that this mortgage was not paid, but that both mortgages were subsisting encumbrances when he conveyed to the defendant. It is proved, moreover, by this witness and by John Wickham, that at the time of the sale of this property by the mortgagor to the defendant, there was a meeting between them at the house of the complainant to settle the amount due to the complainant upon his two mortgages; that the amount was ascertained by calculation to be over twelve hundred dollars, and that a memorandum of the amount was made by the defendant, and given to the complainant. That memorandum, in the handwriting of the defendant, is produced as an exhibit. It is as follows: "Made out by Thomas B. Vreeland,—amount of both mortgages up to January 16, 1857, is \$1,212.11."

The force of this evidence is attempted to be impaired by alleging that the evidence does not show that the papers were in the hands of Thomas B. Vreeland. Suppose they were not. The facts, as clearly proven, are that the mortgagor and the defendant, who was about to purchase, went to the house of the complainant to ascertain the amount due to the complainant upon the mortgages. There was no question as to their existence, and no pretense that either of them had been paid. The only question was, How much was due upon them? The papers were produced, the calculation of interest was made, the amount due ascertained, reduced to writing by the defendant himself, and given to the complainant. Whether the bond and mortgage was actually in the hands of the defendant was totally immaterial. It was in his presence open to examination. It was treated as a subsisting debt, both by the mortgagor who was about to sell and by the defendant who was about to purchase and to assume the payment of the mortgage debt as a part of the consideration of the purchase.

It is certainly a remarkable circumstance, the effect of which can be overcome only by very clear evidence, that the complainant himself believed and acknowledged that the mortgage was satisfied, and assented to its cancellation. But the mistake, I think, is satisfactorily accounted for. He was an aged man, and manifestly very ignorant of business. There had been a proposal at one time to take up the mort-

gage in question by giving another. He had held notes for a part of the indebtedness. He was under no mistake in regard to the amount due him. For that he relied upon the memorandum given to him by the defendant. At no time did he admit that the whole amount, as now claimed, was not due. His mistake was in regard to the securities which he held for the debt. He supposed that the entire debt was covered by the last mortgage or by notes. This is very clearly shown to be a mistake.

The sole question raised upon the pleadings and evidence is, whether the mortgage is a subsisting lien upon the mortgaged premises. The evidence upon this point leaves no room for doubt.

Equity will relieve where an instrument has been delivered up or canceled through fraud or mistake: *Miller v. Wack*, 1 N. J. Eq. 204; *Trenton Banking Company v. Woodruff*, 2 Id. 117; 1 Story's Eq. Jur., sec. 167.

It is urged on the part of the defendant that to entitle a party to relief on the ground of mistake, it must be of such a fact as he could not by reasonable diligence have obtained knowledge of. If otherwise, it is culpable negligence, against which equity will not relieve: 1 Story's Eq. Jur., sec. 146; *Deare v. Carr*, 2 N. J. Eq. 513.

The principle is usually applied in relieving against contracts entered into under a mistake, though it is doubtless susceptible of a wider application. The present case, however, does not fall within the operation of the principle. The complainant received no consideration for the act—the defendant gave none. The complainant entered into no engagement from which he asks relief. Under a mistaken impression that the mortgage was satisfied, he consented to its cancellation. It is clearly against conscience that the defendant should avail himself of the mistake to escape the payment of an honest debt.

The complainant is entitled to a decree for the mortgage debt.

MORTGAGE CANCELED OF RECORD UNDER MISAPPREHENSION AS TO PAYMENT WILL BE ENFORCED: *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 42; *Dudley v. Bergen*, 23 Id. 400, both citing the principal case. So where the parties intending to assign a mortgage went to the recorder's office and entered satisfaction of it on the record, the satisfaction was vacated and the mortgage foreclosed. The court said: "There is no applicable distinction between this case and that where a scrivener, through ignorance or inatten-

tion, fails to select or prepare such an instrument as effectuates the previous agreement of the parties, and relief is always decreed in that case: Story's Eq. Jur., sec. 115. Had the recorder here, upon being informed by the parties that the agreement between them was that the mortgage in question should be more effectually transferred to Russell, prepared a release, instead of an assignment, whether he did so through mere inattention to what he was doing, or through a misapprehension of its legal effect in the premises, there would be no doubt that equity would relieve against the mistake. The rule must be the same in a case where the parties have made the mistake for themselves, and without the aid of either scrivener or recorder:" *Russell v. Mixer*, 42 Cal. 477.

GORDON v. TORREY.

[2 McCARTER, 112.]

Mechanic's Lien is not Affected by Fact that Owner Conveyed Away Land, pending the erection of the building, the conveyance being merely as collateral security for the payment of a debt due to the grantee, and intended as a mortgage, and upon the satisfaction of the debt, the land was reconveyed. These circumstances dispose of the objection that the building was not erected by the owner of the land, nor by his consent expressed in writing.

Mechanic's Lien is not Affected by Change of Ownership during the progress of the building. The change of ownership does not make a new commencement of the building.

Mechanic's Lien is not Affected by Interruption of Work for a short period, and its subsequent resumption without a change of its original character. The interruption and subsequent resumption do not constitute a new commencement.

Time of Commencement of Building, and Consequent Attaching of Mechanic's Lien, is not Required to be Specified, by the New Jersey statute, either in the lien itself, or in the record of the judgment.

Mechanic's Lien is not Affected because Owner of Premises Procured It to be Filed, and Concealed its Existence from Mortgagee at the time of obtaining a loan.

BILL in equity to foreclose a mortgage. The facts are stated in the opinion.

I. W. Scudder, for the complainant.

Slaight, for the lien-holders

By Court, GREEN, Chancellor. The bill is filed to foreclose a mortgage given to the complainant by Edward P. Torrey, upon a house and lot in Jersey City. The only question in dispute between the parties is, whether the complainant's mortgage is a prior encumbrance to the liens of the mechanics and material-men for work done and materials furnished in the erection of the house upon the premises. The complain-

ant's mortgage is dated on the 11th, and recorded on the 13th of April, 1861. The liens were filed between the 27th of July and the 27th of August, inclusive, in the same year. The building was commenced, according to the testimony of Torrey, the owner and builder, in the fall of 1859. The foundation was then built. The building was resumed in the following spring about May, and completed, he thinks, in May, 1861. So far as can be ascertained from the liens filed, the work and materials which form the subject of the lien were done and furnished between September, 1860, and May, 1861.

1. It is objected to the validity of the lien that the building was not erected by the owner of the land, nor by his consent expressed in writing. The legal title was in Torrey, the builder, from the 19th of September, 1859, until the 11th of August, 1860, when he conveyed it to Thomas B. Oakley. On the 10th of April, 1861, it was reconveyed by Oakley to Torrey. Torrey testifies, and the fact does not seem to be at all questioned, that he conveyed the land to Oakley merely as collateral security for the payment of a debt due from him to Oakley; that the deed was intended simply as a mortgage, and that upon the satisfaction of the debt the land was reconveyed. This effectually disposes of the objection. But admitting the title to have been absolute in Oakley, it is not perceived that the rights of the lien-holders are affected. The building was commenced by Torrey while the title was in him. The foundation was then built. The liens attached at the commencement of the building upon the estate of Torrey, and the title passed to Oakley, and was reconveyed to Torrey subject to the encumbrance of the liens. A change of ownership during the progress of the building does not make a new commencement of the building, nor affect the validity of the encumbrance: *Hern v. Hopkins*, 13 Serg. & R. 269; *Pennock v. Hoover*, 5 Rawle, 291; *Edwards v. Derrickson*, 28 N. J. L. 39.

Nor will the interruption of the work for a short period, and its subsequent resumption without a change of its original design and character, constitute a new commencement, or affect the attaching of the lien when the building was originally commenced: *American Fire Insurance Co. v. Pringle*, 2 Serg. & R. 138; *Hern v. Hopkins*, 13 Id. 269.

After the conveyance to Oakley, the building was continued under Torrey's directions, and for his benefit. Oakley never interfered with his operations nor questioned his right, nor is

he now in court setting up title in himself, or questioning the right of Torrey or the validity of the liens.

2. It is objected that the time when the building was commenced is not specified, either in the lien filed or in the record of the judgment, and that the encumbrance, therefore, cannot attach until the actual entry of the judgment. The statute, in express terms, makes the debt a lien from the commencement of the building: Nix. Dig. 526, sec. 11. The proceeding to enforce the lien is a proceeding *in rem*. It does not create the lien any more than a proceeding and decree for the foreclosure of a mortgage creates the encumbrance. There is nothing in the statute which requires that the time of the commencement of the building, and the consequent attaching of the lien, should be specified, either in the lien itself, or in the record of the judgment. It would seem that any such entry, either in the lien or in the judgment, except where the fact was in some way put in issue and found by the jury, would be unauthorized and unavailing as evidence of the fact. It is certainly a matter of regret that so material a circumstance affecting the title to real estate, as the inception of the encumbrance, should be left to depend upon the parol testimony of witnesses often deeply interested in regard to facts of equivocal character, which may constitute the commencement of a building. But so is the statute, and the court cannot add to its requirements. It may be true, as insisted by the complainant's counsel, that in the absence of parol evidence of the time of the commencement of the building, the record of the judgment can furnish no evidence of the lien prior to the date of the work done or materials furnished as specified, or to the actual entry of the judgment. But that question does not arise in the present case. The fact is unquestioned that the building was nearly completed when the complainant's mortgage was given.

There is nothing in the case to justify a doubt in regard to the *bona fides* of the claims of the lien-holders. The evidence shows that the work was done and the materials furnished as charged by the claimants, and that the debts have not been paid. This is proved, both by the evidence of the lien-holders themselves, and of Torrey, the owner and builder. There is nothing tending to discredit their testimony.

If it be admitted that Torrey acted in violation of good faith in concealing or in failing to disclose the existence of the liens at the time he procured the loan from the complainant for

which the mortgage was given, it cannot affect the legal or equitable rights of the lien-holders. Nor are those rights at all impaired, if it be admitted that the liens were filed at the instance of Torrey. He may, in perfect consistency with good faith and fair dealing, have desired that the just claims of the mechanics and material-men should be secured upon the building, in preference to the Oakley mortgage, which he then believed, and subsequently proved to be fraudulent. But if Torrey was actuated by fraudulent motives, it could not affect the rights of the lien-holders. The validity of the liens cannot depend upon the motives which suggested their being filed.

There is nothing in the evidence to affect the validity of the liens, or their priority to the complainant's mortgage.

It will be decreed accordingly.

MECHANIC'S LIEN AFFECTS WHAT ESTATES OR INTERESTS: See *Lyon v. McGuffey*, 45 Am. Dec. 675, and the note thereto.

MECHANIC'S LIEN IS NOT AFFECTED BY INTERRUPTION OF WORK for a short period, and its subsequent resumption without a change of its original design and character: *Manhattan Life Ins. Co. v. Paulson*, 28 N. J. Eq. 305, citing the principal case.

MOUNT v. MOUNT.

[2 McCARTER, 192.]

DIVORCE WILL NOT BE GRANTED FOR ADULTERY OF HUSBAND WHEN ONLY EVIDENCE OF GUILT IS THAT HE WAS AFFECTED WITH VENEREAL DISEASE within six months after the marriage.

PETITION for a divorce on the ground of adultery. The opinion states the facts.

By Court, GREEN, Chancellor. The parties were married on the 5th of May, 1861. On the 10th of March, 1862, the wife filed her petition for divorce on the ground of adultery. The allegation of the petition is, that the husband, during the months of October and November, 1861, and at other times, committed adultery with divers females, whose names are unknown to the petitioner. The proof is, that the defendant, about the month of October, 1861, within six months after his marriage, was affected with the venereal disease. The case rests solely upon this evidence. There is no evidence as to the previous relations of the parties, or as to the habits, character, or conduct of the defendant. The wife testifies that she saw nothing to excite her suspicion in regard to his conduct

about the time of the alleged adultery; nor does she allege that she did so at any other time after the marriage. She further states that they did not live together at that time. The first suspicion that appears to have been entertained by the wife of her husband's criminal conduct resulted from the voluntary statement, made by the husband to her mother, that he was suffering from the disease. It appears, further, from the evidence, that in October, 1861, the wife was apparently free from disease. The husband has been examined as a witness, and denies most explicitly that he has been guilty of adultery. I do not think the evidence sufficiently strong to justify a decree for divorce.

The fact that the husband, long after marriage, is infected with the venereal disease has been held sufficient *prima facie* proof of adultery: *Popkin v. Popkin*, in note to the case of *Durant v. Durant*, 1 Hagg. Ecc. 765; *Johnson v. Johnson*, 14 Wend. 637; *North v. North*, 5 Mass. 320; 2 Greenl. Ev. 44.

In the case of *Collett v. Collett*, 35 Beav. 312, where it was attempted to establish adultery against the husband by showing that the wife was suffering under a recent infection, Dr. Lushington said: "It is impossible to lay down any general inflexible rule, for each case must depend upon its own circumstances; and it is scarcely possible to conceive a case without some circumstances which would assist the court in coming to a conclusion." On the hearing of the same cause by the judicial committee, it was held that "the adultery of the husband must not be inferred from the mere fact of the wife's being tainted with the venereal disease, although she herself is not even suspected of adultery, inasmuch as the existence of such a disease in the wife is consistent with the adultery of the husband, with her own adultery, and with accidental communication of it." The converse of the proposition would seem to be equally true, that the existence of the disease in the husband is consistent with the adultery of the husband, with its having been communicated by the wife, and with accidental communication of it: *Bishop on Marriage and Divorce*, sec. 440.

When the facts relied upon are capable of two or more interpretations, any one of which is consistent with the defendant's innocence, they will not be sufficient to establish guilt. Though it is not necessary to prove the direct fact of adultery, it is necessary to show that adultery is the only necessary conclusion from the facts of the case: *Ferguson v. Ferguson*, 3 Sand. 307.

Proceeding, as I do, upon the assumption of the entire innocence of the wife, is the guilt of the husband the necessary conclusion from the facts of the case? The parties had been married less than six months when the disease developed itself. The wife had been previously married. How long she had been a widow does not appear. Is it impossible or highly improbable that the wife may have been infected with the disease during her former marriage, and that the disease was still lurking in her blood? It is proved that the wife voluntarily submitted herself to a medical examination, and the physician testifies that he discovered no traces of the disease. But it is worthy of remark that she submitted herself to the examination under the pretext that she had fallen from a horse, and it was not until afterwards that the physician was informed of the real object of the examination. The investigation does not appear to have been made at all in reference to the existence of the disease in question. Under the circumstances, may not the symptoms of the disease have escaped the attention of the physician, or may they not have been so far suppressed as not to be perceptible? Is the evidence sufficient to prove the non-existence of the disease so fully as to establish the guilt of the defendant?

As already said, there are no other circumstances in the case to aid the court in arriving at a correct conclusion, no evidence touching the husband's character or habits. It is not proven that the husband kept improper company or visited disreputable places of resort. It is not shown that he ever visited or associated with any other woman than the complainant. The evidence is not in itself sufficient to justify a decree. But admitting that the complainant's evidence is sufficient *prima facie* to raise a presumption of adultery against the husband, the case does not rest upon this evidence alone. The defendant has been examined. He testifies explicitly that since his marriage he has had connection with no other woman than his wife. Without attaching undue importance to the evidence of the defendant, admitting that it is not entitled to the weight due to the testimony of a fair and impartial witness, it is nevertheless entitled to some weight, especially in connection with his own voluntary statement to the mother of the complainant that he was infected with the disease. Why should he have made that statement if he was really guilty of adultery? His defending the cause is evidence that it was not made by collusion. The explicit testimony of the defendant

is at least sufficient to overcome the effect of evidence on the part of the complainant.

I shall decree for the defendant, but without costs as against the complainant.

ADULTERY, PROOF OF: See *Matchin v. Matchin*, 47 Am. Dec. 486, and note citing prior cases. The principal case is cited in *Summerbell v. Summerbell*, 37 N. J. Eq. 617, to the point that in case of proceedings for a divorce on the ground of adultery, such an interpretation of doubtful acts of the defendant will be adopted as is consistent with innocence.

SKILLMAN v. SKILLMAN.

[3 McCARTER, 478.]

RESULATING TRUST IN FAVOR OF WIFE IS NOT ESTABLISHED, or any interest paramount to the title of her husband shown, by the fact that, with the consent of her husband, she contracted to purchase a lot of land, which was conveyed to the husband, who paid the purchase-money, and also a part of the cost of a house erected on the lot, and the balance was secured by his bond and mortgage on the premises, which was afterwards paid by the wife from her earnings.

EARNINGS OF WIFE BELONG TO HUSBAND, at the common law; and they do not become the property of the wife even in equity, without a clear, express, irrevocable gift, or some distinct affirmative act of the husband divesting himself of them or setting them apart for her separate use.

BILL in equity. The opinion states the facts.

Leupp, for the appellant.

Speer, for the respondent.

By Court, HAINES, J. The complainant, by her bill, claims to have an equitable interest in a certain house and lot of land, the legal title to which was in her husband at the time of his death, and she seeks to have it protected against a judgment obtained by the defendant, John G. Skillman, against her husband in his lifetime, on a bond and warrant of attorney to confess judgment, upon the ground that the judgment was without consideration and fraudulent and void. The equity of the bill rests in allegation of a right and interest of the complainant in the house and lot, and in the fraudulent intent of the defendant, John G. Skillman, in procuring the judgment. The charge of fraud is fully denied by the answer in response to the bill; so that if the complainant has any interest in the property, and was in a situation to question the validity of the judgment, on this explicit denial of the

fraud charged, the injunction might have been properly dissolved. But the case made does not show such an interest in the property as would entitle her to protection against the judgment, even if it were fraudulent. Her claim is not based on a right of dower, and if it had been it would have needed no protection in this form, as the judgment against her husband could not affect her dower. But she claims by a right in equity paramount to the legal title of her husband. She insists that, having negotiated for the purchase of a lot of ground and for the building of the house, and paid a considerable portion of the purchase-money, a trust results to her. On examining the allegations of the bill, it appears that she, with the knowledge of her husband, negotiated for the purchase of the lot, and that it was conveyed to him, and he paid the purchase-money; that afterwards a contract was made for the erection of a small house on the lot at the cost of \$675, of which sum \$500 was secured by his bond and his and her mortgage on the property, and the residue, \$175, paid to the contractor. It is not alleged to have been paid by her, and the presumption is that it was paid by her husband.

Thus far the whole consideration money on the purchase of the lot and the cost of the building were paid and secured by the husband. After this, and until May, 1854, she paid the yearly interest on the bond and mortgage, and one hundred dollars of the principal. She afterwards contributed to the monthly payments on two shares of Mechanics' Building and Loan Association, purchased by him, until he became entitled to a loan of four hundred dollars, which was taken and secured by a mortgage on the house and lot, and with that money the residue of the sum secured by the original mortgage was paid. She afterwards contributed to the monthly payments due by way of interest on the loan, until the value of the two shares were so enhanced as to be nearly sufficient to pay off the last mortgage, all of which payments so made by her were almost entirely from her own earnings, her husband contributing but little towards it. Admitting the entire truth of all these allegations, they fail to establish a resulting trust, or to show any interest in the property paramount to the title of her husband. By the common law, the earnings of the wife, the product of her skill and labor, belong to the husband. They do not become the property of the wife, even in equity, without a clear, express, irrevocable gift, or some distinct affirmative act of the husband divesting himself of them

or setting them apart for her separate use. There is no allegation of any such act here. She was permitted to apply the product of her labor, not to her own use, but to the payment of her husband's debts. Her object was truly praiseworthy and her efforts provident. She meant to secure a home for herself and her family, and it may be regretted that they had not taken proper measures to accomplish that purpose. As the business was transacted, the title to the house and lot was in her husband, and the purchase-money and the cost of building paid by him, and out of money belonging to him. The legal and equitable title vested in him. There was nothing done or suffered to divest him of such title, even as between him and his wife, much less as between him and his creditors. The bill was properly dismissed, and the decree of the chancellor must be affirmed, but under the peculiar circumstances of the case, without costs.

The decree of the chancellor was affirmed by the following vote:—

For affirmance, BROWN, COMBS, CORNELISON, ELMER, HAINES, KENNEDY, OGDEN, FORT, SWAIN. VREIDENBURGH, and WHELPLEY, JJ.

For reversal, none.

EARNINGS OF WIFE BELONG TO HUSBAND: *Prescott v. Brown*, 39 Am. Dec. 623; *McLemore v. Pinckston*, 68 Id. 167; compare *McKinnon v. McDonald*, 72 Id. 574; but in the principal case there was no question as to the right of a husband to give his wife her earnings: *Peterson v. Mulford*, 36 N. J. L. 427, distinguishing the principal case.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PERKINS v. NEW YORK CENTRAL R. R. Co.

[24 NEW YORK, 196.]

RAILROAD COMPANY CANNOT CONTRACT FOR EXEMPTION FROM LIABILITY TO PASSENGER for damage resulting from its own willful misconduct, or that degree of recklessness which is its equivalent.

RAILROAD COMPANY MAY, BY CONTRACT, EXEMPT ITSELF FROM LIABILITY TO GRATUITOUS PASSENGER, for any degree of negligence in its servants or agents, other than its directors or managing officers who are to be considered as identical with the company itself.

WHETHER RAILROAD COMPANY IS LIABLE AS UPON IMPLIED GUARANTY OF SECURITY OF ITS ROAD to a gratuitous passenger contracting to exempt the company from liability for the negligence of its agents, when the injury resulted from the misconduct of a track-master in using bad material in building a bridge, not shown to have been known to the managing officers, questioned. Smith, J., *concedendo*, and dissenting.

APPEAL from the supreme court. Plaintiff's husband applied for and obtained from a director of the defendants' company a free pass on the defendants' railroad from Rochester to Albany and return, the material terms and conditions of which are sufficiently set out in the opinion of Smith, J. On the day following, he started from Rochester in a train of the defendants' railroad, and was killed, with others, by the breaking down of a bridge. It appeared that the bridge was built three years previously under the direction of one Evarts, the defendants' track-master, and proof was given that it was built of unsuitable materials, and that their unfitness was pointed out to Evarts at the time. It was shown by the defendants that Perkins (plaintiff's husband) was riding on the

free pass when the accident occurred. The jury found a verdict for the plaintiff, and defendants appealed. Other facts, and the material parts of the judge's charge which were excepted to, sufficiently appear in the opinions.

Sidney T. Fairchild, for the appellant.

George F. Danforth, for the respondent.

By Court, SMITH, J. The death of the intestate was caused and occasioned under circumstances which, if he had merely sustained a bodily injury, from which he had recovered, would unquestionably have entitled him to maintain an action for such injury, unless he had debarred himself from such action by accepting and riding upon a free ticket. The plaintiff's right of action, under the statutes of 1847 and 1849, depends upon the same circumstances. Unless Mr. Perkins, if he had survived the injury which resulted in his death, could have maintained an action for such injury, his widow and next of kin clearly cannot maintain this action. The statutes of 1847 and 1849 give to the personal representatives of a deceased person, whose death is caused by the wrongful act, neglect, or default of any person or corporation, an action to recover a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death. This a new and original cause of action given by and depending wholly upon the statute. The damages recoverable in such case depend upon entirely different principles from those recoverable by the person injured, in case death had not ensued from the injury. In such case, the person injured would only recover compensatory damages, personal to himself, including expenses incurred and losses sustained in consequence of the injury: *Lincoln v. Saratoga and Schenectady Railroad Company*, 23 Wend. 425.

But in the case where death results from the injury, the pecuniary value of the life of the person killed, to the next of kin, is the measure of damages, to the extent of five thousand dollars: *Whitford v. Panama R. R. Co.*, 23 N. Y. 467; *Blaks v. Midland Railway Co.*, 10 Eng. L. & Eq. 443.

Assuming that the pass on which the deceased was riding is to be regarded as a free ticket, and that the defendants were carrying the deceased gratuitously, independently of the question whether Mr. Perkins expressly agreed to assume all risk of accidents upon the trip, the defendants would be clearly liable for any injuries sustained by him, if he had survived the

same; and in this action, on the same ground, would be liable also to the plaintiff.

Having received the deceased into their cars, they would, in this view, be bound to carry him safely. They were and are not bound to carry him or any person gratuitously; but undertaking to carry him, they must do it carefully, as with other passengers. This was settled in principle in the case of *Coggs v. Bernard*, 2 Ld. Raym. 909. In that case, the defendant undertook to take up several hogsheads of brandy, then in a certain cellar, and lay them down again in a certain other cellar, and did the work so carelessly that one of the casks was staved, and a great quantity of the brandy lost. The defendant was a mere private person, and it was claimed that, as he was not a common porter, and was acting gratuitously, he was not liable. But upon very full argument, and after much consideration, it was held that, having assumed and undertaken to do the work, he was bound to do it carefully, and was liable for any injury resulting from his negligence. This precise question was decided in this court in *Nolton v. Western R. R. Co.*, 15 N. Y. 444 [69 Am. Dec. 623], and in the supreme court of the United States in the *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. 468; in *Steamboat New World v. King*, 16 Id. 474; and in *Gillenwater v. Madison and Indianapolis R. R. Co.*, 5 Ind. 840 [61 Am. Dec. 101]. The next inquiry is, whether the ticket upon which Mr. Perkins was riding was, in legal effect, anything more than a notice. It is well settled in this state that common carriers cannot limit their responsibility by a notice. This has been deemed settled law since the decision of the cases of *Hollister v. Nowlen*, 19 Wend. 234 [32 Am. Dec. 455], and *Cole v. Goodwin*, Id. 251 [32 Am. Dec. 470].

But this ticket can hardly be regarded as a mere notice. If Mr. Perkins had applied to purchase a ticket in the ordinary way, or had paid for his passage like passengers generally, and had received this ticket for his money, and as his authority to get into and ride in the defendants' cars, the ticket should probably be regarded as a mere receipt and voucher for his fare, and could not, I think, be regarded as an agreement on his part to take the risk of accidents; for the defendants could not, in such case, by their own act, enforce or impose any such agreement upon the passenger, or compel him to relinquish his legal right to be safely transported. The carrier clearly cannot limit his responsibility by his own act: *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 382.

But he did not apply to purchase a ticket. He did not pay his passage or contemplate riding in the defendants' cars like ordinary passengers paying full fare.

Applying for a pass, or free ticket; taking it and having it in his possession some six or eight hours before the starting of the train in which he was to go; and having his attention expressly called to its terms, taken in connection with the fact found by the jury that he was, at the time of the accident, actually riding on this ticket,—if not conclusive against him as a legal presumption, would at least be evidence that he assented to the terms indorsed upon the ticket, from which a jury would be authorized to imply such assent; and as the circuit judge was not asked to submit any such question to the jury, I think the plaintiff is hardly at liberty to deny that there was, in fact, such an agreement as the defendants claim.

Assuming, then, that Perkins agreed to take "all the risks of accidents," and expressly agreed that the defendants should not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person,—for such are the terms of the ticket,—the question remains, What is the extent and force of such agreement? Upon its face, it is clearly sufficiently comprehensive to embrace every description of accident, casualty, or risk attending railroad travel. But it must obviously be subject to some limitation and qualification. It ought not to be considered as applying to such risks as could not have been within the intent and contemplation of the parties, and cannot apply to such as are not within the legitimate compass of contract upon principles of public policy. The learned judge who tried this case at the circuit charged the jury that "while, if the deceased was riding upon the pass, he was riding upon the conditions annexed to the pass, yet, notwithstanding the conditions thus particularly expressed, if the negligence of the defendants was gross and culpable, if it was of such a character that it would subject the party to prosecution for fraud or crime,—then it does not come within these conditions." In other words, that if the ticket is in its nature a contract, the parties to the contract did not contemplate such cases of negligence as are fraudulent or criminal in their character.

The rule of exception, from the apparent scope and purview of the contract, asserted in this part of the charge, I think cannot be sustained. It states that fraudulent and criminal negligence is not within the scope of the contract. This would

clearly be so, if the defendant were a natural person and was stipulating in respect merely to his personal acts. And if it were not so, fraud vitiates all contracts; and no person will be allowed to stipulate for crime. If the defendants were private persons who could commit crime and could be indicted and convicted under the statute of murder or manslaughter, for killing Mr. Perkins, most certainly such crime would not be within the purview of this contract. It is quite clear that Mr. Perkins never intended to agree, or the defendants to stipulate, that they, by their servants or agents, might kill him. Such was not the bargain. No one will pretend that the right to commit murder or suicide could be embraced in this or any contract. Like all other agreements, this contract must be construed in the light of the existing facts and circumstances at the time it was made, and not derive its construction from subsequent events. Parties, in making a contract, must be held to contemplate all the ordinary and possible incidents, accidents, or contingencies which may attend its execution; and such accidents and contingencies must be deemed within the purview of the contract, not as accidents expected, but as accidents possible.

What, then, did these parties mean by this contract? The cardinal rule of interpretation is, What was the intent of the contracting parties at the time of making the contract? In the light of this rule, what are the facts? Perkins applied to the defendants' director for a free pass. A free pass means the privilege of riding over the defendants' railroad without payment of the customary fare. The defendants are a railroad corporation, exercising the rights and subject to the responsibilities of common carriers, and liable in a civil action in this capacity, for all injuries to persons or property transported by them, resulting from the negligence or unskillfulness of their agents or servants. The business of the defendants is all necessarily performed by agents and servants, and the defendants are necessarily obliged to employ a large number of persons as such agents and servants, some of whom will be more or less careless or negligent, notwithstanding and in despite of the utmost care, diligence, and caution in their employment. The defendants are transporting persons and passengers by the powerful agency of steam, and when accidents did occur, they were liable to be attended, more or less, with very serious consequences. This the parties both well knew and they also well knew that railroad accidents were of

frequent occurrence; that railroad travel was subject constantly to perils resulting from the carelessness and negligence of engineers, conductors, baggage-men, brakemen, switch-tenders, and others; that trains were frequently thrown off the track or came in collision, and were subject to a variety of accidents and casualties, against which no human prudence or skill in the employment of agents could entirely guard; and that all such accidents involve, unavoidably, more or less loss of life or limb, or bodily injury, and other disastrous consequences. With perfect knowledge of these facts, Mr. Perkins asked for and accepted the free pass upon the express condition that he should "assume all risk of accidents," and expressly agreed "that the company shall not be liable under any circumstances, whether by the negligence of the defendants' agents or otherwise, for any injury to the person," etc. Such is the bargain. It can mean nothing else than that Perkins will take for himself the risk of all accidents and injuries to his person attending his contemplated trip in the defendants' cars from Rochester to Albany, so far as such accidents and injuries might result from the negligence of the defendants' agents and servants. The defendants, in view of the accidents, attended with much pecuniary loss, resulting constantly from the negligence of some of their agents, proposed to carry Mr. Perkins without charge to Albany, upon condition that he would take for himself the risks attending the trip.

The question between the parties was simply which should take the risk of such accidents as might occur in consequence of the negligence of some of the defendants' many agents. Without an agreement exempting and absolving them from all liability in respect to such accidents, and the injuries resulting therefrom, the defendants would be legally responsible for such injuries. Mr. Perkins assumes the risk for himself. He becomes his own insurer. He absolves the defendants in advance from all liability "for any injury to his person" from such negligence. It was a fair insurable risk, and Perkins agreed to assume it for himself. If this be the contract, upon what principle it can be claimed that it does not embrace the accidents which may result from the gross negligence of the defendants' agents, I cannot conceive. The contract makes no exception in respect to degree of negligence. It embraces all degrees. It uses the term "negligence" in its general generic sense. To hold that it does not embrace gross negligence is to interpolate into it a qualification not made by

the parties, and which tends materially to impair and nullify its force, for the parties well knew that accidents were liable to result from the gross negligence of defendants' agents as well as from inferior negligence. The contract related to the acts of third persons acting as agents of the defendants. Perkins agreed to take his risk in respect to the negligence of such third persons. He took it entirely. If the agents were guilty of criminal negligence, which is only another name for gross negligence, when it caused death or injury to life or limb, the agent himself is punishable criminally for such negligence. The principal never could be so punished. His civil responsibility, therefore, is discharged by the contract. There is no reason why the defendants should be responsible for the gross negligence of their agents more than for slight negligence. To the principle asserted in the charge, I have tacitly assented in two cases, in *Bissell v. N. Y. Central R. R. Co.*, 29 Barb. 602, and in this case at general term which follows, and was decided upon the authority of that case. But I am satisfied upon reflection that it is essentially unsound. The portion of the charge referred to may, perhaps, embrace a denial of the right of the defendants to relieve themselves by contract from liability for the gross negligence of their agents. The charge impliedly admits that the contract was valid as a protection to the defendants as against all accidents resulting from the degrees of negligence below gross negligence.

A party who claims exemption from liability, for the negligence of his servants or agents, must undoubtedly base his claim upon the express words of his contract. It will not be presumed in his favor. In the case of *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. 383, the contract did not embrace, in terms, the negligence of the defendant's agents, and the court held that it could not be regarded as stipulating for such negligence. Judge Nelson, who gave the opinion of the majority of the court, says: "If it is competent at all for a carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done at least in terms that could leave no doubt as to the meaning of the parties."

The case of *Wells v. Steam Nav. Co.*, 8 N. Y. 381, holds the doctrine that negligence may be stipulated against, in respect to agents, but will not be deemed included in general words of exception unless expressly mentioned. Judge Gardiner, says: "A man may contract against fraud or felony committed by

those in his employment." The words of the agreement in that case, upon which the question arose, were that the canal-boat be taken in tow, etc., "at the risk of the master and owners thereof." These words, it was held, and was properly held, did not include gross negligence.

But where negligence, as in this case, is expressly mentioned and stipulated against in the contract, I think the claim to make an exemption to the force and effect of the contract, based upon a distinction in the degrees of negligence, unsound and untenable.

I think with Lord Denman, who, in *Hinton v. Dibbin*, 2 Q. B. 661, said: "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists." Judge Curtis, in *Steamboat New World v. King*, 16 How. 474, also says it may be doubted whether the term "slight, ordinary, and gross negligence" can be usefully applied in practice.

The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the other impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly, before cases are made to turn by the verdict of juries upon any such distinction, the judges should be able to define, with some precision, what they mean by gross negligence, slight negligence, and ordinary negligence. It will be seen, on examining the many cases reported where the question has arisen, that this has been found utterly impracticable by the judges, when called upon to instruct juries on the question, and also when called on to declare the law more carefully in bank. Negligence is essentially always a question of fact, and every case depends, necessarily, upon its own particular circumstances. What is negligent in a given case may easily be affirmed by a jury; but in what degree the negligence consists, in any scale of classification of degrees of negligence, is not so easily determined,—will ordinarily be a matter of pure speculation and of no practical consequence.

Upon the ground taken in that part of the charge referred to, that if the negligence of the defendants' agent, Evarts, was gross and culpable, it was not embraced within the contract, and the defendants were liable in this action for the consequences resulting from such negligence, the learned judge, I think, erred; and the verdict cannot be sustained.

SELDEN, C. J., and DENIO, DAVIES, ALLEN, and GOULD, JJ., concurred in this conclusion; and the court ordered a new trial.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGER RESULTING FROM NEGLIGENCE: See *Galena etc. R. R. Co. v. Fay*, 63 Am. Dec. 323, and note; *Hegeman v. Western R. R. Corp.*, 64 Id. 525, note; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506, and note 514.

PAYMENT OF FARE AS AFFECTING LIABILITY OF CARRIER OF PASSENGERS: See *Peters v. Bylands*, 59 Am. Dec. 746, note; *Gillmeater v. Madison etc. R. R. Co.*, 61 Id. 101, note 109; *Nelson v. Western R. R. Corp.*, 69 Id. 623, note 623; *Washburn v. Nashville etc. R. R. Co.*, 75 Id. 784, note 789.

EXEMPTION OF PASSENGER CARRIER FROM LIABILITY BY CONTRACT.—To what extent a railroad company engaged in carrying passengers may, by special contract, limit its liability for injuries resulting from the want of due care, was the principal question considered in the case of *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181; affirming S. C., 26 Barb. 641, which was also the case of a gratuitous passenger traveling on a free pass, which exempted the company from liability as in the principal case. And it was there held that a contract entered into between a railroad company and a gratuitous passenger, by which the former is exempted from liability for the negligence of its servants and agents, resulting in injury to the passenger, is not against law or public policy, and is valid, whether the negligence be slight or gross, Sutherland and Wright, JJ., dissenting. This rule is adhered to, not only in the principal case, but also in the later decisions of the courts of that state: See *Heinemann v. Grand Trunk R'y Co.*, 1 Sheldon, 121; S. C., 31 How. Pr. 454; *Knell v. U. S. etc. Steamship Co.*, 1 Jones & S. 433; *Sunderland v. Westcott*, 2 Sweeny, 263; S. C., 40 How. Pr. 469; *Mynard v. Syracuse etc. R. R. Co.*, 7 Hun, 403; S. C. reversed, 71 N. Y. 180; *Lee v. Marsh*, 43 Barb. 107; *Keeney v. Grand Trunk R'y Co.*, 59 Id. 140, all of which cite the principal case in support of the doctrine. See also *Poucher v. New York Cent. R. R. Co.*, 49 N. Y. 263; *Cragin v. New York Cent. R. R. Co.*, 51 Id. 64; *Stinson v. Paine*, 32 Id. 333. And in the recent case of *Seybolt v. New York etc. R. R. Co.*, 95 Id. 562, 573, it is said to be now beyond dispute "that an individual transported over the route of a carrier of passengers may debar himself by a contract founded upon a sufficient consideration, from any claim to damages for injuries to his person or property occasioned by the negligence of such corporation during the course of transportation." And see *Mynard v. Syracuse etc. R. R. Co.*, 71 Id. 185. But the terms of a contract which will exempt the carrier from liability for negligence must be clear and unmistakable: *Blair v. Erie R'y Co.*, 66 Id. 313; *Ulrich v. New York etc. R. R. Co.*, 21 N. Y. Week. Dig. 162; *McElhovan v. Erie R'y Co.*, 21 Id. 21. And when the carrier is a corporation, whose affairs are managed by a board of directors, it cannot exempt itself from liability for the willful negligence, misconduct, or recklessness of its board of directors: *Knell v. U. S. etc. Steamship Co.*, 1 Jones & S. 433; *Heinemann v. Grand Trunk R'y Co.*, 31 How. Pr. 454; S. C., 1 Sheldon, 121, citing the principal case to this point.

A distinction is to be made in this respect between the directors or managing officers of a corporation and its subordinate agents: See *Lee v. Village of Sandy Hill*, 40 N. Y. 451, citing the principal case. So the distinction made in the principal case between the negligence of the corporation, acting through its president and board of directors, and the negligence of employees, or ser-

vants and agents, is referred to but not recognized in *Illinois Cent. R. R. Co. v. Read*, 37 Ill. 507, 508. In the case of *Smith v. New York Cent. R. R. Co.*, 29 Barb. 132, the holder of a free ticket, or "drovers' pass," had taken the risk of personal injury "from whatever cause," and the railroad company was held liable for the gross negligence and want of ordinary care of their servants and agents resulting in injury to the holder. The judgment was affirmed by the court of appeals: S. C., 24 N. Y. 222, by a vote of five judges to three, two of the judges holding that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. In the later case of *Bissell v. New York Cent. R. R. Co.*, 29 Barb. 602, the contract was the same, except that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents, or otherwise," for injury to the person or stock of the passenger. The latter was killed, and the determination of the supreme court was that the railroad company was liable for gross negligence. But this judgment was reversed by the court of appeals: S. C., 25 N. Y. 442, *post*, p. 369, by a vote of four judges against three, the majority holding that the ticket was a free ticket, and that the case was governed by that of *Wells v. New York Cent. R. R. Co.*, 24 Id. 181. The still later case of *Poucher v. New York Cent. R. R. Co.*, 49 Id. 263, was in all essential respects similar, and it was held that, under the contract, the defendant was exempt from liability. See also opinion of Selden, J., reported in the principal case.

IN HARMONY WITH DOCTRINE OF NEW YORK CASES above stated, are many of the decisions of the courts of other states. Thus, in New Jersey, a contract that in consideration of a free passage, a passenger will assume the risk of injuries to his person from the negligence of the servants of the railroad company, is held to be valid, and that a passenger who receives, knowingly, a free ticket with an indorsement of such contract upon it, will be bound by the terms of such contract, and cannot recover for injuries from such negligence: *Kinney v. Central R. R. Co.*, 32 N. J. L. 407; S. C., affirmed, 34 Id. 513; S. C., 3 Am. Rep. 265, citing the principal case. And to the same effect, see *Mann v. Birchard*, 40 Vt. 326, 332; *Balt. & Ohio R. R. Co. v. Brady*, 32 Md. 333; *Illinois Cent. R. R. Co. v. Read*, 37 Ill. 484; *Toledo etc. R. R. Co. v. Beggs*, 85 Id. 80. So the English rule is, that where a railway company agrees to allow one to travel under a free pass, on the terms that he travels "at his own risk," such agreement clearly exempts the company from liability for all negligence, even that which is gross and willful: *McCawley v. Furness R'y Co.*, L. R. 8 Q. B. 57; *Gallin v. London etc. R'y Co.*, L. R. 10 Q. B. 212; *Hall v. North Eastern R'y Co.*, L. R. 10 Q. B. 437, all of which are cases of parties riding upon what are known as "drovers' passes." See also *Burke v. South Eastern R'y Co.*, L. R. 5 C. P. D. 1; *Alexander v. Northern R'y Co.*, 35 U. C. Q. B. 453; *Johnson v. Great Western etc. R'y Co.*, 9 I. R. O. L. 108, following the English rule. It should, however, be observed, that the English rule was formerly the other way: See *Peck v. North Staffordshire R'y Co.*, 10 H. L. Cas. 473.

RULING OF SUPREME COURT OF UNITED STATES has been uniformly against the validity of all contracts to exempt a common carrier from liability for loss resulting from any negligence. And it was decided by that court that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, and that this rule applies with especial force to common carriers of passengers: *Railroad Co. v. Lockwood*, 17 Wall. 357, citing the principal case and reviewing many decisions;

see also *Railway Co. v. Stevens*, 95 U. S. 655; *Indianapolis etc. R. R. Co. v. Horst*, 93 Id. 291. The same views are entertained in many decisions of the different state courts, holding that no condition in a free pass or ticket will avail to protect the carrier from responsibility for the gross negligence of its servants and agents: See *Jacobus v. St. Paul etc. R. R. Co.*, 20 Minn. 125, 129, citing and dissenting from the principal case; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 489; *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1; *Cincinnati etc. R. R. Co. v. Pontius*, Id. 221; *Arnold v. Illinois Central R. R. Co.*, 83 Ill. 273; *Ross v. Des Moines Valley Railway Co.*, 39 Iowa, 246; *Southern Express Co. v. Moon*, 39 Mo. 822; *School District v. Boston etc. R. R. Co.*, 103 Mass. 552; *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335; *Lawson v. Chicago etc. R. R. Co.*, 64 Wis. 447; S. C., 54 Am. Rep. 634; *Black v. Goodrich Transp. Co.*, 55 Wis. 322; S. C., 42 Am. Rep. 713. And some of the courts have regarded a person traveling on what is called a "drovers' pass," as a passenger for hire, and not a gratuitous passenger: *Ohio etc. R. R. Co. v. Selby*, 47 Ind. 471; *Virginia etc. R. R. Co. v. Sayers*, 26 Gratt. 328; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; S. C., 35 Am. Rep. 748; and have treated the contract as that of a common carrier, attempting to limit his liability by special agreement with a paying passenger: *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315, reviewing the New York cases, *supra*. And see *Railway Co. v. Stevens*, 95 U. S. 655; *Flinn v. Philadelphia etc. R. R. Co.*, 1 Houst. 469. A pass, purporting on its face to be a free pass, may nevertheless be given for a consideration, and the holder be a passenger for hire; and his acceptance of the pass does not estop him from showing that he was not subject to the terms and conditions printed on the back thereof, exempting the company from liability for any injury he might receive by the negligence of the agents of the company, or otherwise: *Railway Company v. Stevens*, 95 U. S. 655. So a railroad company issuing through-tickets over its own and connecting roads is held liable for the safety of a passenger to the point of destination, although the ticket contains a provision exempting the company from liability beyond its own line: *Central Railroad v. Combs*, 70 Ga. 533; S. C., 48 Am. Rep. 582; and see *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 332; compare *Railroad Co. v. Sprayberry*, 8 Baxt. 341; S. C., 35 Am. Rep. 705. In England, a railway company is not liable for the safety of a person riding over their line "at his own risk," under a contract made with another company. If the contract avails to protect the latter, it also protects the former: *Hall v. North Eastern Ry Co.*, L. R. 10 Q. B. 437; and see *Bristol etc. Ry Co. v. Collins*, 7 H. L. Cas. 194.

IN ABSENCE OF EXPRESS EXEMPTION PROVIDED BY CONTRACT, a railroad company is held liable for the consequences of its own negligence, or that of its servants or agents, to persons traveling upon its trains as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. And one temporarily supplying the place of an express messenger stands in the same position with him, and is entitled to the same protection: *Blair v. Erie Railway Co.*, 66 N. Y. 313, citing *Nolton v. Western R. R. Corp.*, 15 Id. 444; and distinguishing the New York cases already noticed, of persons riding free on drovers' passes, and agreeing to do so at their own risk of personal injury from whatever cause. So it is held that a railroad company owes the same degree of care to mail agents riding in postal cars in charge of the mails as they do to other passengers. And where a government mail agent was killed by an accident on the defendant's railroad while riding upon a free pass stipulating for exemption from liability, such stipulation was held to be unauthorized

and void, and the defendant nevertheless liable: *Seybolt v. New York etc. R. R. Co.*, 96 N. Y. 562; S. C., 47 Am. Rep. 75, distinguishing *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256. In the latter case, the question was upon the construction of the word "passenger" as used in the statute (act of the 4th of April, 1868), and it was held that the legislature intended to exclude postal agents from the class therein designated as passengers, and that they were thereby placed on the same footing as the employees of the company in respect to their rights of action against the company for injury occasioned by negligence. But in the absence of statutory regulation, the plaintiff would have been entitled to recover: *R. R. Co. v. Hampton*, 64 Tex. 427; *Hammond v. R. R. Co.*, 6 S. C. 130; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Collett v. E'y Co.*, 16 Q. B. 984.

PASSENGER, IN LEGAL SENSE OF WORD, is defined to be "one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor": *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256. A mere trespasser, a person who steals a ride upon a train, or who is employed thereon, is not a passenger, nor entitled to protection as such: *Id.*; and see *Gardner v. New Haven etc. Co.*, 51 Conn. 143; S. C., 50 Am. Rep. 12; *Houston etc. R. R. Co. v. Moore*, 49 Tex. 31; S. C., 30 Am. Rep. 98; *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382; *Memphis etc. R. R. Co. v. Chastine*, 54 Miss. 503; *Duff v. Allegheny Valley R. R. Co.*, 91 Pa. St. 458; S. C., 36 Am. Rep. 675. Thus where a person imposed himself upon a railroad company, as an express messenger, and obtained the consent of the conductor to carry him without fare, it was held that he did not become entitled to the rights of a passenger: *Union Pacific R'y Co. v. Nichols*, 8 Kan. 505; S. C., 12 Am. Rep. 475. So where one was injured by the negligence of a railroad company while traveling on one of its trains upon a commutation ticket issued to another person, and by its terms not transferable, he was held to be without remedy against the company: *Way v. Chicago etc. R. R. Co.*, 64 Iowa, 48; S. C., 52 Am. Rep. 431; and similar case of *Toledo etc. R. R. Co. v. Beggs*, 85 Ill. 80; S. C., 23 Am. Rep. 612. And generally speaking, where a person by fraud or stealth gets upon a carrier's vehicle, without the knowledge of the carrier or his servant, and is either killed or injured through the negligence of either, no action can be maintained for such death or injury: *Id.*; *Toledo etc. R. R. Co. v. Brooks*, 81 Ill. 245; *Chicago etc. R. R. Co. v. Michie*, 83 Id. 427; *Chicago etc. R. R. Co. v. Casey*, 9 Ill. App. 632; *Rucker v. Mo. Pac. R. R. Co.*, 61 Tex. 490; *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62. Compare *Biddle v. Hestonville etc. R'y Co.*, 112 Pa. St. 551; *Wabash etc. R. R. Co. v. Shacklet*, 105 Ill. 384; *Siegrist v. Arnot*, 10 Mo. App. 197. But one traveling by a passenger train, and not connected with the railroad company, is presumed to be a passenger traveling for a consideration, and the burden is on the carrier to prove that he is a trespasser: *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; *Creed v. Pennsylvania R. R. Co.*, 86 Id. 139; S. C., 27 Am. Rep. 693. On the other hand, as it respects a person not in the service of the carrier and riding upon a train not designed for the transportation of passengers, the presumption of law is that he is not a passenger and not lawfully on the train, and no liability for negligence can be imposed upon the carrier as to him, unless the special circumstances of the case rebut this presumption: *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382; S. C., 15 Am. Rep. 513; *Waterbury v. New York etc. R. R. Co.*, 21 Klatchf. 314; S. C., 17 Fed. Rep. 671; and see *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9. That a common carrier of passengers is bound to the exercise of ordinary care to prevent injuries to trespassers on its vehicles, after the dis-

covery of the trespasser, see *Higley v. Gilmer*, 3 Mont. 90; S. C., 35 Am. Rep. 450; *Benton v. Chicago etc. R. R. Co.*, 55 Iowa, 496; *Chicago etc. R. R. Co. v. Smith*, 46 Mich. 504; *Kline v. Cent. Pac. R. R. Co.*, 37 Cal. 400; *Harlan v. St. Louis etc. R. R. Co.*, 65 Mo. 22. Compare *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65. And it was held by the supreme court in Minnesota that one riding on a train with the consent of the conductor is not to be deemed a trespasser, and may recover for injuries caused by the negligence of the carrier, although he was not a passenger in the ordinary sense of the term: *Grady v. St. Paul etc. R. R. Co.*, 30 Minn. 217.

IN CALIFORNIA, CARRIER OF PERSONS WITHOUT REWARD must use ordinary care and diligence for their safe carriage: Cal. Civ. Code, sec. 2096. So in Dakota: Dakota Civ. Code, sec. 1214. And the constitution of Nebraska provides that the liability of railroad corporations as common carriers shall never be limited: Neb. Const., art. 11, sec. 4. So by the constitution of Pennsylvania no railroad or transportation company can furnish free passes, or tickets at a discount, to any person except officers or employees of the company: Pennsylvania Const., art. 17, sec. 8. In Iowa, railroad companies are by statute made liable for all damages caused by the negligence of their agents or employees, and no special contract will exempt them from such liability. And the provisions of the statute apply equally to passengers and agents of the companies: See *Ross v. Des Moines Valley R. R. Co.*, 39 Iowa, 248; *Deppe v. Chicago etc. R. R. Co.*, 36 Id. 52; *Schroeder v. Chicago etc. R. R. Co.*, 41 Id. 344. Statutory provisions of similar import, more especially affecting the liability of railroad companies to their servants, exist in several of the other states, and have received judicial construction in the following decisions: *Kansas Pac. R. R. Co. v. Peasey*, 29 Kan. 169; S. C., 44 Am. Rep. 630; 11 Am. & Eng. R. R. Cas. 260; S. C. again, 34 Kan. 472; *Gurns v. Chicago etc. R. R. Co.*, 52 Wis. 672; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; *Chase v. Am. Steamboat Co.*, 10 R. I. 79; *Bery v. Chicago etc. R. R. Co.*, 50 Wis. 419. And see as to the construction of the English "Employers' Liability Act, 1880, 43 & 44 Vict., c. 42," the cases of *Griffiths v. Earl of Dudley*, L. R. 9 Q. B. D. 357; *Cox v. Great Western Ry. Co.*, Id. 106; *Millward v. Midland Ry. Co.*, 14 Id. 68.

OTHER CITATIONS OF PRINCIPAL CASES than those given in the preceding note are as follows, and to the points stated: A common carrier may, by express contract, limit his liability as insurer in respect to property received for carriage, as against all loss and damage from whatever cause, except his own personal negligence or fraud: *Nicholas v. New York etc. R. R. Co.*, 4 Hun, 329; S. C., 6 Thomp. & C. 606. The principal case is one of express contract, and is distinguishable from the case of a person accepting a receipt for a package delivered to a carrier, without reading the conditions, or being made aware of the nature of the receipt. In the latter case, the person accepting the receipt is not bound to know its contents, and is not presumed to know and assent to its terms: *Kirkland v. Dinsmore*, 2 Hun, 51; S. C., 4 Thomp. & C. 309. Under the terms of a contract expressly excepting risks by fire, in the carriage of goods, only ordinary risks are intended, and the carrier is not excused from liability, in case of loss, if the loss occurred through the fault or negligence of the carrier, or its agents or employees: *Stedman v. Western Transp. Co.*, 48 Barb. 98. And a clause in a bill of lading exempting a carrier from negligence or default of the pilot, master, and mariners, does not exempt from liability for negligence of stevedores employed by the carrier to unload the vessel. Such clause is not to be extended for the exemption of the carrier: *Zung v. Howland*, 5 Daly, 140. A common carrier

must be held to guarantee the soundness and safety of their vehicles, bridges, roadway, and machinery: *Warner v. Erie Railway Co.*, 49 Barb. 568. So the duty of the master to his servants is to use reasonable care to provide and employ none but competent and skillful servants, and to discharge from his service, on notice thereof, any who fail to continue such: *Chapman v. Erie Railway Co.*, 1 Thomp. & C. 526. The board of directors or managing agents of a corporation, in respect to its external relations, must be considered as so far identical with the corporation as to throw upon it the liability for their negligence: *Steinweg v. Erie R'y Co.*, 43 N. Y. 126. Failure of the employees of a carrier to demand fare will not render one liable to be held guilty of negligence, or of being carried gratuitously, so as to relieve the carrier from liability for damages arising through negligence on its part: *Doran v. East River Ferry Co.*, 3 Lans. 108.

THE PRINCIPAL CASE IS CITED to the point that in case of a passenger traveling on a free ticket, a common carrier may stipulate against responsibility for all kinds of negligence of its servants and agents, and the doctrine disapproved in *Railroad Company v. Lockwood*, 17 Wall. 384; *Makin v. Balk*, etc. R. R. Co., 14 W. Va. 196; *Ill. Cent. R. R. Co. v. Read*, 37 Ill. 507; *Indiana Cent. R. R. Co. v. Mundy*, 21 Ind. 51, 52; *Jacobus v. St. Paul etc. R. R. Co.*, 20 Minn. 129; *Rees v. Des Moines Valley R. R. Co.*, 20 Iowa, 254; *Hoeper v. Welch*, 27 Cal. 44, 46, in dissenting opinion of Sanderson, C. J.

PEOPLE v. ALBANY AND VERMONT R. R. Co.

[2d NEW YORK, 261.]

RAILROAD COMPANY FORFEITS ITS FRANCHISE BY ABANDONMENT OF PART OF ROAD, after its completion between the points named in its charter or articles.

RAILROAD COMPANY HAS NOT OPTION TO DISCONTINUE PART OF ITS ROAD, AND FORFEIT ITS FRANCHISE, but the remedy is not by action in equity for a specific performance, but by *mandamus* or indictment, or at the election of the people, by action to annul the charter of the corporation.

APPEAL from the supreme court. A corporation, formed pursuant to the provisions of the general railroad act, constructed and put in operation a railroad between the points named in its charter. A few years subsequently, the property and franchises of the company were sold under mortgage foreclosure proceedings, and the purchaser at such sale, and his associates, organized a new company (the defendant) to maintain and operate the purchased road. The defendant operated its road for a few days between the points originally named, and then ceased to operate the eastern end of the route for a distance of about twenty-one miles, but continued to operate the remainder. The defendant being engaged in removing the iron track and fixtures used in the operation of the abandoned portion of its road, action was commenced by the

attorney-general, praying an injunction restraining the removal of such iron track and fixtures, and demanding, as relief, that the defendant be required to reopen and operate, for public use, the abandoned part of its road. Trial was before a referee, who dismissed the complaint. Upon appeal, judgment entered on his direction was affirmed, and the plaintiff appealed to this court.

John H. Reynolds, for the appellant.

John B. Gale and William A. Beach, for the respondent.

By Court, WRIGHT, J. The defendant has voluntarily abandoned all of its road east of the Waterford Junction, whilst it is continuing the operation of that part between Albany and Waterford in connection with the Rensselaer and Saratoga Railroad. It is exercising its corporate rights and privileges, and the franchise granted by the state to maintain and operate a railroad between Albany and Eagle Bridge, in the operation of one between Albany and Waterford Junction, without any assent by the legislature to the abandonment of any part of its road, or any legislative modification of the franchise granted to it. This cannot be legally done. It is the exercise of a franchise or privilege not conferred upon the defendant by law. But it is not the precise question now presented. The present question is, whether a railroad corporation, formed under the general act for constructing, maintaining, and operating a railroad upon a definite route, and between places specified in its articles of association, may be compelled by a court of equity, in an action brought by the state, after it has constructed its road, to continue to maintain and operate it. Of course it is not pretended that such an action can be maintained, or the power exercised by the courts, unless the obligation or duty is imposed by law on the corporation to maintain and operate its road for the public use and benefit.

The inquiry primarily suggested is, whether there be any express legal obligation or duty, or any to be necessarily implied, resting on a railroad corporation, to maintain and operate its road for the public use, irrespective of its own interests. If any such obligation or duty is imposed, it is by the general law under which the corporation is created, or to be implied from its provisions, or those of the charter of the company. The railroad act does not, in terms, require a company organized under it to construct, maintain, or operate the railway mentioned in its articles of association. The act is permissive,

and not mandatory. The associates are endowed with corporate existence, and as a corporation, vested with powers to construct and operate a railroad for the conveyance of persons and property between established points, and in this sense, to exercise a public employment. The associates, by the act of acquiring corporate existence, do not absolutely agree with the state that, in consideration of such corporate existence, and the franchise with which they are invested, that they will construct the railroad mentioned in the charter, and continue to operate it during their corporate existence. No contract obligation is thereby created on the part of the corporation. This is apparent from the act itself. The corporation is first brought into existence, and powers conferred on it for the execution of a special purpose, viz., to construct, maintain, and operate a railroad for the conveyance of persons and property. There is no absolute requirement or obligation assumed by the corporation created under the act, to execute the purpose. Indeed, the law itself contemplates that there may be an omission or neglect to carry out the object of the association, and a non-user of the corporate privileges. Unless the corporation begins to construct its road and expend ten per cent of its capital in such construction within two years after its articles of association are filed, or finish the road and put it in operation in five years from the time of filing such articles, its corporate existence and powers are to cease: Laws of 1850, c. 140, sec. 47.

The penalty for the non-user of the corporate rights and privileges for five years is a forfeiture of such rights and privileges. It is optional with the corporation whether it will exercise the powers bestowed, or undertake the work; and being so, the grant and acceptance of the railroad franchise cannot properly be construed as a contract between the state and corporation, binding the latter to construct and maintain the railroad for the public benefit. It is only from the charter and its acceptance that any contract relation between the state and the corporation can arise; and such contract must be operative, if at all, the moment the charter is accepted. The provisions of the railroad act negative the idea that any contract relation between the state and the corporation formed under it, springs out of the grant and acceptance of the franchise. There is, therefore, no contract obligation resting on a corporation, brought into existence by the railroad act, in favor of the state or interested citizens, to construct, maintain, and operate, for the public con-

venience and use, the road named in its articles of association. But is the duty specially declared, or necessarily to be implied from the provisions of the railroad act? There is no such duty specially declared. There are no express words of the act requiring the corporation created under it to make and maintain the roadway. Had there been, there would probably have been but few corporations formed under it. Nor do I think the duty can be clearly collected from the general purview of the whole statute. To promote the construction and maintenance of railroads to be publicly used in the conveyance of persons and property, is undoubtedly a purpose of the law. It invites capitalists into this field of enterprise, not as public servants charged with a public duty, but as private corporators, whose privileges are to be exercised, if at all, under limitations and restrictions, looking to the benefit of travelers and patrons of the work. The legislature in effect say, as the proposed road is to be of public utility, we empower you to build and operate it, and to that end confer on you corporate existence, and the power to act in a corporate capacity, and also the further power to take lands for corporate use *in invitum*. The corporation is essentially a private one. If it constructs and operates the road, it is to do it under the limitations and restrictions imposed by the law.

It may never, however, enter upon the construction of the proposed road. Insurmountable obstacles may intervene to the prosecution of the work. The law seems to contemplate such a state of things; and provides that in the event of non-user of the corporate privileges, or a non-completion of the road within a limited period, such corporate privileges shall cease. These provisions are inconsistent with the idea that the duty is assumed by the company to construct the proposed road from having obtained a charter for that purpose, or that it is within the scope or intention of the act to absolutely impose, for public benefit, such duty on the corporators. Permission is given to make the road, and the law leaves the question of the exercise of its powers to the option of the company. This would not have been so if the legislature had intended to require the construction and operation of the proposed road for any period whatever. For anything of an obligatory character in the act, the associates, after corporate organization, may proceed to construct the projected road, or they may omit or neglect to do it, and forfeit their corporate privileges. This option existing, it negatives the notion that any duty is im-

posed to build the road. And if no duty is imposed to construct, it must follow that there is none to maintain and operate the road after construction. Such duty cannot be created by the act of the corporation itself. There is nothing in the railroad act, nor power anywhere, to prevent a railroad corporation from abandoning its road and forfeiting its corporate privileges by non-user, if it chooses to do so. Neither by the provisions of the statute, nor otherwise, is it under any legal obligation, or owes any duty to the state or the public to maintain and operate its road for an instant of time after its own interests shall cease to be subserved thereby.

If, then, there be no legal obligation or duty springing out of the grant and acceptance of a railroad franchise, or imposed by the railroad act, resting on the corporation to maintain and operate its road for public use, the state cannot maintain an action, or a court of equity compel its maintenance and operation. The obligation or duty in favor of the state or the public must exist, or it cannot be enforced. It is only upon the theory of an existing obligatory contract between the state and the corporation, binding the latter to maintain and operate the railroad for the use of the public, or that such duty is imposed by law, that the state can interfere by action, or the courts compel a specific performance. Indeed, if the duty be merely enjoined by the railroad act, I cannot well see how it can be enforced by action. The railroad franchise is granted upon condition that the corporation will construct and operate the railroad named in its articles of association. Grants upon condition, without express covenant, are never the subject of an action for specific performance. The right is forfeited, and the redress is by reclaiming it. Besides, where the breach is of a mere statute duty, an action is not the appropriate remedy. It has been held that when the duty to build a railroad was imperative by the act authorizing it, that it could not be enforced by injunction at the suit of the attorney-general: *Attorney-General v. Birmingham & O. J. R. R.*, 7 Eng. L. & Eq. 283. There are various duties charged upon companies by the railroad act, such as maintaining fences or farm crossings. In such cases, an action by the attorney-general for specific performance would be without a precedent. The only admissible remedies, it seems to me, for a breach of the duties charged on corporations by the railroad act, are *mandamus* or *quo warranto*, or indictment.

I am of the opinion that a railroad corporation, organized

under the general act, cannot be compelled, at the suit of the attorney-general, to re-open and operate a road that it has abandoned, and that if such corporation chooses to abandon its works, and no longer assert the corporate rights and privileges conferred on it by its charter, the remedy of the state is not by action for specific performance. The only remedy, where there has been a total abandonment and a non-user of the corporate powers, is an action by the people to vacate the charter or annul the existence of the corporation, and a like remedy is applicable, when the corporation shall abandon part of its road, and continue to operate the remainder under its corporate franchise. A company endowed with a franchise or privilege to maintain and operate a railroad on a fixed route, and between places named in its charter, cannot exercise the franchise or privilege in the operation of a road upon another route and between other places. The franchise can only be legally exercised by the corporation operating its entire road.

There is no privilege granted or right obtained to operate a part thereof, and if it should undertake to do so, it is exercising a franchise or privilege, without legal sanction. An action is authorized by statute to be brought by the attorney-general, in the name of the people of the state, on leave granted by the supreme court or a judge thereof, to vacate the charter or annul the existence of a corporation, whenever such corporation shall exercise a franchise or privilege not conferred upon it by law: Code, sec. 430. In the present case the defendant, being endowed with the franchise or privilege of maintaining and operating a railroad between Albany and Eagle Bridge, has voluntarily abandoned the maintenance and operation of so much of its road as lies between the Waterford Junction and Eagle Bridge whilst it is continuing to exercise its franchise and corporate rights and privileges in operating a railroad between Albany and Waterford Junction. The state cannot compel the corporation to reopen and operate the abandoned road. It cannot insist that the company shall exercise the rights and privileges conferred on it. If the company chooses not to use them, there is no power to compel their use. But the defendant, under a franchise or privilege granted to it to maintain and operate a railroad between Albany and Eagle Bridge, cannot legally operate one between Albany and Waterford Junction. It is the exercise of a franchise or privilege not conferred on it by law. Its charter may be vacated, or its corporate existence annulled; but because it

is doing something not legally sanctioned is no ground for constraining it to do what neither any contract, obligation, nor the law requires of it. I think the complaint in this case was properly dismissed at the special term. The people cannot maintain an action to compel a railroad company to operate its road for the use of the public after it shall have abandoned it for reasons peculiar to itself. Whilst the corporation exercises the franchise, it must do it under the limitations and restrictions imposed by its charter or by law. It may omit to use its franchise or privileges, or abuse its powers or exercise privileges not conferred on it by law, and thereby forfeit its charter, or its corporate existence be annulled. Any remedy which the public may have for a breach or neglect of duty imposed by the railroad act, must be by *mandamus*, *quo warranto*, or indictment; and the performance of such duty cannot be specifically enforced in equity at the suit of the attorney-general.

The judgment of the supreme court should be affirmed.

All the judges except SELDEN, C. J., and GOULD, J., who did not sit in the case, concurred in this conclusion.

DENIO, SUTHERLAND, ALLEN, and SMITH, JJ., however, were of the opinion that a corporation is under a legal obligation to exercise its franchises, and that it has not the option to discontinue a part of its road and forfeit its franchises. They agreed that the remedy is not by action in equity for a specific performance, but by *mandamus* or indictment, or at the election of the people by proceeding to annul the existence of the corporation.

Judgment affirmed.

FORFEITURE OF CORPORATE FRANCHISES BY MISUSE OR NON-USE: *State v. Commercial Bank*, 53 Am. Dec. 106; *People v. Kingston Turnpike R. Co.*, 35 Id. 551; *Turnpike Co. v. McCarty*, 65 Id. 768.

WAIVER OF FORFEITURE OF CORPORATE FRANCHISE: See *State v. Fourth N. H. T.*, 41 Am. Dec. 690; *People v. Phoenix Bank*, 35 Id. 634.

COURTS OF EQUITY HAVE NOT JURISDICTION OVER CORPORATIONS for the purpose of restraining their operations or winding up their concerns: See *Neill v. H.W.*, 76 Am. Dec. 508; *Treadwell v. Salisbury Mfg. Co.*, 66 Id. 490.

POWER OF CORPORATION TO ALIENATE FRANCHISE TO BE CORPORATION: See *Coe v. U. P. etc. R. R. Co.*, 75 Am. Dec. 518, note 548.

THE PRINCIPAL CASE IS CITED as follows, and to the points stated, A railroad company cannot incur a forfeiture of its franchise at pleasure, and in disregard of the rights of others: *People v. Troy and Boston R. R. Co.*, 37 How. Pr. 431. The act of a railroad company in discontinuing and taking

a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit, unless it is so construed as to check the course of worldly traffic."

Upon the principle that the statute was entitled to such a construction as would promote the ends for which it was passed, and that the act in question in that case was within the mischief intended to be suppressed, and within the word made use of to suppress it, judgment was given against the plaintiff; the court holding that a horse-dealer could not maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. In the same case, the narrow construction put upon the act by the same judge, in *Blossome v. Williams*, 3 Barn. & C. 232, is disapproved. Park, J., in *Williams v. Paul*, 6 Bing. 653, says: "I should be sorry to be supposed to recede from the cases decided on this point, and the principle established to enforce the observance of the Lord's day, which tend so eminently to the advantage of society, since no laws can be of avail except in so far as they are founded on religion." The English statute differs, in terms, from our own, but they were enacted in the same spirit, and with the same general purpose, and are entitled to the same liberal construction in furtherance of the remedy and the suppression of the mischief contemplated. The same view has been taken of the policy and character of the statute in our own courts. Nelson, J., in *Northrup v. Foot*, 14 Wend. 248, says: "It is a remedial statute, and should be liberally construed." Full effect has been given to the statute whenever it has come before our courts. While acts not within the inhibition have been treated as valid although done on Sunday, and contracts not within the spirit of the act have been enforced, although made on that day, all acts within the statute have been regarded as illegal, and contracts prohibited to be made on that day, if then made, and all contracts for a violation of that law, and the performance of acts on Sunday not lawful to be done on that day, have been regarded as void, and have not been enforced. No judicial act can be performed on Sunday; and hence an award published on that day is void at common law: *Story v. Elliott*, 8 Cow. 27 [18 Am. Dec. 423]. An action for deceit in the sale of a horse on Sunday, when all secular business is prohibited on that day, will not lie: *Northrup v. Foot*, 14 Wend. 248.

The contract being void, no action can arise out of it, or be

maintained depending upon it. The charge of circulating a memorial to the legislature on Sunday was held to present a question of law for the decision of the magistrate to whom application was made for a warrant, and thus furnish a protection to the magistrate when sued for false imprisonment: *Stewart v. Hawley*, 21 Wend. 552. A clerk in an attorney's office was not allowed to recover of his principal for extra services performed on Sunday: *Watts v. Van Ness*, 1 Hill, 76; *Palmer v. Mayor etc. of New York*, 2 Sand. 318; *Dodge v. Lambert*, 2 Bosw. 570. There is no dispute as to facts. The only evidence bearing upon the question was that elicited upon the cross-examination of a single witness of the plaintiffs, and the nonsuit was granted upon the ground that the contract upon which the action was brought was in contravention of the statute regulating the observance of Sunday. No request was made to submit any question of fact to the jury; no complaint is even made that the court declared the legal effect of the evidence without a settlement of the facts by the jury; and both parties desire a decision of the case upon the merits, without regard to the form in which the questions are presented. There is no evidence that the contract was made on Sunday; and if it was, it would not for that reason be void, if it did not contemplate and provide for some prohibited service or act to be done on Sunday. In other words, a contract made on Sunday for the publication of an advertisement in a newspaper published on the ordinary business days of the week is not prohibited, and would be valid: *Story v. Elliott*, 8 Cow. 27 [18 Am. Dec. 423]; *Sayles v. Smith*, 12 Wend. 57 [27 Am. Dec. 117]; *Boynnton v. Page*, 13 Id. 425. Neither is there evidence to vitiate the contract upon the ground that the work of setting up and printing either the advertisement or the paper, which is servile work and labor, was to be done, or was contemplated to be done, on Sunday. That work might well have been done on any other day of the week, and was done in whole or in part on Saturday. It was not necessarily done nor was it agreed to be done on Sunday. What the effect would have been had it appeared that all the work had, in fact, been done on the sabbath, if it had been so done for the convenience or pleasure of the plaintiffs, neither the contract nor the nature of the service contemplating any such thing, need not be considered.

The service to be rendered by the plaintiffs was the publication of an advertisement in a Sunday newspaper. There is no

pretense that it was a work of necessity and charity, either to publish the paper or the advertisement, even if it could be brought within the section of which the exception in favor of works of "necessity and charity" forms a part. The advertisement was published with, and as incidental to, the publication of the paper, and the contract must be assumed to have contemplated the service to be performed in the usual way, and as it was in truth done. The papers were sold on Sunday at a public place provided by the plaintiffs, the proprietors, for that purpose; that was the publication, and that the service agreed to be performed, and for which they now ask compensation. The publication of the advertisement was to be, and was, by a public sale of the newspaper in which it was printed, on Sunday. The opening of a place for the sale, and the actual selling of newspapers, is within the mischiefs which the act for the observance of Sunday was designed to remedy. It disturbs the public peace and quiet; interferes with the proper religious observance of the day; is opposed to good morals; and tends to draw men away from the duties of piety and religion, and cannot be distinguished from traffic in any other article which is the subject of sale in market. It matters not what the character of the paper or the character of the advertisement published for the defendants may have been. Neither were "meats, milk, or fish," and therefore, were not within the articles excepted from the prohibition; and even if it were within the other section of the statute, it would be difficult to prove that the sale of the most unexceptionable religious newspaper was an act of "necessity and charity." The statute is very comprehensive, and has sought to use terms which would embrace every article which could be sold in market. It prohibits the exposure and sale of all "wares, merchandise, fruit, herbs, goods, or chattels."

Everything which is the subject of property, and which may be exposed to sale, must be included under some or one of these terms. A newspaper is the subject of property, and when it is made the subject of sale in places opened for that purpose, it is certainly merchandise. Newspapers are made merchandise when they are sold, either at wholesale or retail, as other articles are sold, which have ever been usually regarded as merchandise. This mode of publication, by selling newspapers in large packages, to be resold by the purchaser, or at retail, and by the single paper, is of comparatively modern introduction; but as in this way the character of merchandise is

given to the paper, the business of selling and exposing to sale the newspapers, must be governed by the general laws affecting similar dealing in other articles of merchandise. It is exposing an article to sale that constitutes the offense, and not the character of the article, unless it is among the exceptions in the act. "Goods, wares, and merchandise," include all movable property that is ordinarily bought and sold. "Chattels" is more comprehensive than "goods," and includes animate property: 2 Chitty's Pleadings, 55, note r. The plaintiffs necessarily, in the performance of their agreement by the publication of the advertisement, violated the letter as well as the spirit of the act prohibiting the exposure of merchandise for sale on Sunday, and no action will lie upon such contract. In a sense, it was a contract by the plaintiffs for the performance of servile work on the sabbath. They agreed to publish and circulate the advertisement of the defendants on Sunday, by delivering a copy to each of their customers who should buy of them a copy of their paper; and incidentally they agreed to expose for sale and sell on that day their paper containing the advertisement. This was servile work in the same sense that the services of the attorney's clerk was, or that of a salesman in a dry-goods store would be. The contract was void, and the judgment must be affirmed.

All the judges concurred.

Judgment affirmed.

CONSTRUCTION OF STATUTES REGULATING OBSERVANCE OF SABBATH: See *City Council v. Benjamin*, 49 Am. Dec. 608, note 616; *Specht v. Commonwealth*, 49 Id. 518.

VALIDITY OF SUNDAY CONTRACTS: See *Adams v. Hamell*, 43 Am. Dec. 455; *Woodman v. Hubbard*, 57 Id. 310; *Butler v. Lee*, 46 Id. 230; *Harris v. Morse*, 77 Id. 269.

THE PRINCIPAL CASE IS CITED as follows and to the points named: The rule established in the principal case forbids a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it. But this rule does not forbid a recovery in an action against a common carrier, for violation of a plain duty in failing to carry the plaintiff safely, although he was at the time violating the statute prohibiting travel upon Sunday: *Carroll v. Staten Island R. R. Co.*, 65 Barb. 41; S. C. affirmed, 58 N. Y. 135. The act regulating the observance of the sabbath is directed against the public exposure of commodities to sale in the streets, or in stores and shops, warehouses or market-places, and has no reference to mere private contracts which are made without violating or tending to produce a violation of the public order and solemnity of the day: *Batsford v. Every*, 44 Barb. 623. Acts not interfering with the benevolent design of the sabbath, by disturbing and hindering those who for themselves

and their families desire to enjoy and improve it, are not prohibited by the statute: *Landers v. Staten Island R. R. Co.*, 13 Abb., N. S., 356. But a contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday, is void under the statute: *Kiley v. Western U. T. Co.*, 28 Hun, 165. Statutes for the observance of Sunday are remedial in their character, and should be liberally construed: *Brunnett v. Clark*, 1 Sheldon, 502.

FRIESS v. RIDER.

[24 NEW YORK, 267.]

PAROL EXTENSION OF TIME OF PERFORMANCE FIXED BY CONTRACT NOT UNDER SEAL, IS VALID.

WHERE TIME OF PERFORMANCE FIXED BY CONTRACT IS EXTENDED, the failure of either party to attend at the time fixed discharges the other, whether he made a tender at the time and place or not, and the fact that he gives a false reason for his subsequent refusal is immaterial.

ACTION by the vendor in a contract for the sale of land to recover stipulated damages for breach of contract. The vendee was ready to perform on the day stipulated, but at the vendor's request performance was postponed by parol agreement until a fixed hour the next day, when the vendee was again ready, and waited three hours for the vendor, who did not appear. Later in the day, the vendor offered to perform, by the tender of a deed, but the vendee refused, assigning as a reason, not the lapse of time, but the commission of waste, which the evidence did not show. The referee who tried the cause ordered judgment for the plaintiff for the sum fixed as stipulated damages, which judgment was affirmed by the supreme court, and the defendant appealed.

Henry Smith, for the appellant.

James H. Ramsey, for the respondent.

By Court, ALLEN, J. The plaintiff not being in a condition to perform the contract on his part on the day fixed for that purpose, the defendant being ready and offering to perform, for the convenience and at the request of the plaintiff performance on that day was waived by the parties and the time extended until the next day at one o'clock; and a place for the performance was agreed upon by parol.

This parol extension was valid, and operated to continue to the parties all their rights under the contract over to the time fixed for its final performance. Every other stipulation in the contract remained in full force; and the only effect of the

arrangement was to substitute another day and agree upon a place for the delivery of the deed and the payment of the purchase-money: *Dearborn v. Cross*, 7 Cow. 48. The contract was continued alive, and neither party lost the right to insist on a strict performance at the time agreed upon by parol, or in default thereof the payment of the liquidated damages: *Esmond v. Van Benschoten*, 12 Barb. 386; *Hasbrouck v. Tappen*, 15 Johns. 200. The mere extension of time is not a waiver of anything. An enlargement of the time for making an award does not dispense with the stipulation to make the submission a rule of court: *Evans v. Thomson*, 5 East, 193. The contract here was not sealed, so that the question as to the effect of a parol agreement upon a sealed executory contract, made before breach, does not arise, which was the question in *Delacroix v. Bulkley*, 13 Wend. 71. But as performance of a covenant may be waived by parol, there seems to be no objection to an extension of time, which is but a temporary waiver of performance by parol. In *Fleming v. Gilbert*, 8 Johns. 523, it was held that the time of the performance of the condition of a bond may be enlarged by parol agreement of the parties: *Stone v. Sprague*, 20 Barb. 509. Assuming, therefore, the enlargement of the time of performance to be valid, and that all the other stipulations remained in full force, the parties were only bound to each other according to the contract thus modified as to the time and place of performance. Each could require performance of the other the next day at one o'clock, at the office of Mr. Smith, and at no other time or place. Certainly the party making default at that time could not put the other party in default by a subsequent offer of performance. The agreement was not for an enlargement of the time until one o'clock the next day, or such other time as should suit the convenience of either party. The plaintiff was in default on the day named in the contract; and the defendant being then ready and offering to perform on his part, might have had his action against the plaintiff without a formal tender of the money. The plaintiff was not then in a condition to perform, and so declared, and a formal tender would have been nugatory: *Bellinger v. Kitta*, 6 Barb. 273; *Buck v. Burk*, 18 N. Y. 337.

This cause of action was waived by the defendant. On the next day, at the hour named, the defendant was at the place agreed upon, and remained two hours ready and expecting to perform the contract, and the plaintiff did not appear. There was no formal offer or display of the money at the office; and

whether, without some formal act of the kind and public demand of performance, the plaintiff could have been subjected to an action, is not material to inquire. . He was certainly in default, and in no situation to subject the defendant to a penalty for non-performance. If the plaintiff had not, by his neglect and default, subjected himself to an action, then the only effect of his non-attendance, and the omission of the defendant to assert his rights under the contract, was an abandonment of the contract by mutual consent. The plaintiff had occasioned the necessity for the delay, and the enlargement was but the giving of time to him to perform on his part, and to relieve him from the consequences of a default already incurred. When the demand was made, the time having elapsed, the defendant was not bound to accept performance or give any excuse for non-acceptance; and whether he gave a true or false reason is not material. Within the case of *Gould v. Banks*, 8 Wend. 562 [24 Am. Dec. 90], the offer, although too late to secure to himself any rights under the contract, or subject the defendant to the penalty for non-performance, might have been in season to deprive the defendant of the cause of action already accrued if he had assigned a reason false in fact, and by silence on the subject waived the true reason which he might have assigned and insisted upon, to wit, the lapse of time. That is the extent to which *Gould v. Banks*, *supra*, goes, and the principle ought not to be extended, certainly not to give a party grossly in default an action for a penalty. If the contract was rescinded and abandoned as suggested, it could not be renewed without the consent of both parties; and it is not material that the reasons assigned by either for declining to treat it as still in force are either frivolous or false. He may refuse to renew the contract without being responsible for his reasons. If the contract had been broken by the plaintiff, then the most he could do was to satisfy and discharge the cause of action against himself; and a discharge of that did not restore the contract and give him an action against the party who had kept his promise. But the judgment of the court below has not the support that the defendant, by not urging the lapse of time as a reason for not accepting the deed when offered, waived it, and thereby consented to treat the contract as still in force. He did say, as one reason why he could not then comply with the request of the plaintiff, that Borst, from whom he was to have the money, had, after waiting until three o'clock for the plaintiff

to come, parted with or made other use of a part of his money. What is that but saying, "It is too late; up to three o'clock I would have accepted the deed; but now I am not in a situation to do so"? This fact the referee has found, but in his conclusion of law ignores it entirely. But without this I am of the opinion that judgment should have been for the defendant, and that no act of the plaintiff, after the time agreed upon for performance had passed, the defendant being at the place ready at the time to perform on his part, could give the plaintiff an action for the damages liquidated by the parties to be paid as the ascertained damages for a default in the performance of the contract.

The judgment must be reversed, and a new trial granted, costs to abide the event.

All the judges concurred.

Judgment reversed, and new trial ordered.

WHEN TIME TO BE DEEMED ESSENCE OF CONTRACT: See *Kirby v. Harrison*, 59 Am. Dec. 677; *Wells v. Smith*, 31 Id. 274; *Jones v. Robbins*, 50 Id. 597, no'ts.

REFUSAL TO PERFORM COVENANTS BY ONE PARTY TO CONTRACT founded upon mutual conditions will excuse a want of entire and absolute preparation by the other party: *Smith v. Lewis*, 63 Am. Dec. 180.

ONE WHO PREVENTS PERFORMANCE OF CONDITION shall not take advantage of the non-performance: *Cape Fear etc. Nav. Co. v. Wilcox*, 78 Am. Dec. 260.

THE PRINCIPAL CASE IS CITED to the point that after breach of covenant to perform, it is competent for the parties to agree by parol to rescind the written contract, in *Arnoux v. Homans*, 25 How. Pr. 428; and it is cited to the point that a party to a contract, asserting his right by an action at law, must bring himself strictly within the terms of the contract, in *Duffy v. O'Donovan*, 46 N. Y. 227; *Myres v. De Mier*, 4 Daly, 352; *Cythe v. La Fontaine*, 51 Barb. 190.

MORRIS v. PATCHIN.

[24 NEW YORK, 394.]

ATTESTATION OF JUDGMENT IN STATE COURT, SIGNED ONLY BY DEPUTY CLERK, IS INSUFFICIENT, under the act of Congress, for the purpose of making it evidence in another state, and the insufficiency is not cured by the addition of the judge's certificate that the attestation is in due form, and authorized by the state law.

RECORD OF JUDGMENT MUST BE SIGNED BY OFFICER AUTHORIZED BY LAW, and must have been filed in the proper office, in order to make it evidence.

QUESTIONS of evidence. Copies of records of courts in Ohio were offered in evidence, certified to be copies in the name of the clerk by a deputy. The presiding judge certified that the individual named in the certificate as clerk was such clerk, and had the custody of the original record of the court, and that the person signing the certificate as deputy clerk was such deputy "duly appointed and qualified, and authorized by the laws of the state of Ohio to certify as aforesaid, and that said attestation to said copy of said record is in due form of law." It was objected that the copies were not attested by the clerk of the court as required by the act of Congress, and that an attestation by a deputy clerk did not entitle them to be read in evidence. Objection overruled and record admitted. The other question of evidence is stated in the opinion. Verdict and judgment for plaintiff, affirmed at general term of the supreme court, and the defendant appealed.

Frederic E. Cornwell, for the appellant.

A. P. Laning, for the respondents.

By Court, ALLEN, J. The act of Congress provides that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestations of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form": Act of May 26, 1790, sec. 1; 1 Story's Laws U. S. 93. This act was passed pursuant to the constitution, conferring the power upon Congress to prescribe the manner in which public acts, records, and judicial proceedings of one state shall be proved in any other state, and the effect to be given to them: Const. U. S., art. 4, sec. 1.

The act prescribes the persons by whom the records shall be attested, but the form of the attestation, and that alone, is not prescribed, but must conform to the usage of the state in which the record is, and not to that of the United States, or of the state in which it is to be used as evidence. The presiding judge can alone certify, and the record is not well proved by a certificate by any other judge of the same court, although of equal authority and rank within the state. It must appear by the certificate that the judge is not only "a" judge of the court, but he is "the chief judge, or presiding magistrate," when there are more judges than one of the court from which the record emanates: Cowen & Hill's Notes to Phill. Ev., p. 1131,

note 771, and cases cited. In *Stephenson v. Bannister*, 8 Bibb, 369, it was held that a record for the court of the district of Union, South Carolina, with the ordinary clerk's certificate under the seal of the court, certified to be in due form by two judges, one stating himself to be the judge "that presided, and one of the judges of the supreme court of law of said state," and the other stating himself to be the "senior judge of the court of law of said state," was not sufficiently authenticated. So, too, the attestation is directed to be by the clerk, and not by any person acting as a substitute for the clerk, or possessing like power under the state laws. In making the certificate which is made evidence under the act of Congress, the clerk derives his authority from the federal and not from the state laws, and the certificate has vitality and effect, not by reason of the official character of the officer making it, under the laws of the state, but in virtue of the act of Congress prescribing it as the mode of proof in this particular case. The certificate of the judge is as to the form of the attestation; that is, that in the attestation the forms in use in the state from which the record comes have been observed: *Ferguson v. Harwood*, 7 Cranch, 408; Conk. Treat., 2d ed., 240. It is made necessary because the courts of one state cannot officially know the forms of another state: *Smith v. Blagge*, 1 Johns. Cas. 239.

The certificate of the judge, as prescribed by the act of Congress, is, that the attestation of the clerk is in due form, and he is not authorized to certify that the certificate of any other person is of equal validity with that of the clerk in the state when made. The form of the attestation is one thing, the person by whom it is made quite another; the certificate of the judge determines the sufficiency of the former, the statute alone declares the latter. Professor Greenleaf lays down the rule that the clerk alone can certify under this statute, and that the certificate of his under clerk in his absence is incompetent: 1 Greenl. Ev., sec. 506; and to this he cites *Sampeon v. Overton*, 4 Bibb, 409. The certificate of the judge as to the authority of any person other than the clerk to make the certificate, is of no more force than would be a like certificate as to the effect of the judgment. Again, if a deputy clerk, or other person, could make the certificate by reason of the power conferred upon him by the state laws, and thus satisfy the act of Congress, such law should be proved as other facts are proved, or as other laws are proved, and not by the certificate

of the judge, which is not made evidence of any such fact. The records were not competent evidence, and were improperly admitted.

Another objection to the records was, that they did not purport to have been signed by any judge of the court, or by any other officer, and it did not appear that they had been filed in the proper office, or in any office. The third and tenth sections of the statute of Ohio, passed in 1853, and given in evidence, transfer the business from the superior court of Cleveland to the common pleas of Cuyahoga County, and provided for a signing of the record of judgment by a judge of the court of common pleas in all cases where a complete record thereof had been made in the supreme court, but not signed by a judge thereof, as well as when a cause had been disposed of in said court, of which a complete record had not been made. The cause or proceeding against the steamboat appears to have been disposed of by the superior court in 1852, but when the record thereof was made or filed does not appear. It is not signed either by a judge of the superior court or court of common pleas. It would seem from the certificate of the clerk to be one of that class of cases transferred to the common pleas, in which a complete record had been made, but which lacked the signature of the judge to make it perfect as a record of the judgment. The record of the other judgment is from the court of common pleas and is not signed, and does not appear ever to have been filed, except as it is certified to have been copied from the record of the court. I infer that it is a record already made up, and only lacking the signature of the judge to make it perfect and entitle it to be filed as a judgment record, upon which final process may issue. It certainly should appear in some way that the records were records of judgment, valid as such, and that they were on file before the final process issued upon them, especially as to the judgment against the steamer, the return of the final process upon which unsatisfied is relied upon as a breach of the condition of the bond for the return of the vessel. A transcript of the proceedings or a history of the action does not become a record until it has been signed by the officer designated by statute. The forms prescribed by law, for evidencing and perpetuating the evidence of the judgment of the court, must be pursued: *Marvin v. Herrick*, 5 Wend. 109; *Barrie v. Dana*, 20 Johns. 307; *Butler v. Lewis*, 10 Wend. 541; *McDonald v. Bunn*, 3 Denio, 45; *King v. Smith*, 8 Barn. & C. 341; 1 Arch. Pr., 9th ed., 485. The

papers were imperfect as records of judgment, and should have been excluded. Not having been signed or filed as required by law, they did not authorize the issuing of executions founded thereon: See cases cited before. It is possible that because they had not been signed, they had not been filed as judgment records, but were simply a part of the ordinary files of the court, awaiting the signature of the judge. For these errors of the learned justice upon the trial, the judgment must be reversed.

All the judges concurred.

Judgment reversed, and a new trial ordered.

AUTHENTICATION OF JUDGMENTS OF SISTER STATE: See *Settle v. Allison*, 52 Am. Dec. 393; *McRae v. Stokes*, 37 Id. 698; *Slaughter v. Cunningham*, 60 Id. 463; *West Feliciana R. R. Co. v. Thornton*, 68 Id. 778; *Clark v. Depew*, 64 Id. 717; *Taylor v. Barron*, Id. 281; *Latterett v. Cook*, 63 Id. 428.

THE PRINCIPAL CASE IS CITED to the point that attestation by a deputy is not sufficient, but where the certificate attached to the exemplification of the record of judgment from another state is signed by the "chief clerk," whose signature is duly attested by the presiding judge of the court, it is sufficient, in *Sheriff v. Smith*, 47 How. Pr. 472. The question whether an alien's declaration of his intention to become a citizen of the United States, under act of Congress, can be made before a deputy clerk of any of the courts named in the act, or only before the clerk himself, is raised, but not decided, in *State v. Olin*, 23 Wis. 317, citing the principal case.

RYAN v. FOWLER.

[24 NEW YORK, 410.]

MASTER IS RESPONSIBLE TO SERVANT FOR INJURIES RECEIVED BY LATTER, FROM DEFECTS IN BUILDING WHERE SERVICES ARE RENDERED, such defects being known to the master, or such as he ought to have known by exercising due care.

EMPLOYER MAY RECOVER DAMAGES FROM EMPLOYEE, FOR INJURIES RECEIVED by the fall of a privy insecurely and dangerously attached to the factory in which he was employed.

ACTION for injuries received from defendant's negligence. Plaintiff was employed in the defendant's factory, and having occasion to step into the privy attached to the factory, the structure fell, breaking both her legs. The evidence on the trial tended to show that the privy was insecurely attached, and that the tendency of certain repairs directed by the defendant was to weaken the supports of the privy. Verdict for the plaintiff. The supreme court, at general term, reversed the judgment entered upon the verdict and granted a new trial, and the plaintiff appealed.

John K. Porter, for the appellant.

William A. Beach, for the respondent.

By Court, SMITH, J. The rule governing the liability of the master for injuries sustained by his servant in his employment, and resulting from his negligence, was stated by the learned judge at the circuit quite favorably to the defendants.

The judge, upon the request of the defendant's counsel, and in the language suggested by him, at the close of his charge, stated to the jury that the plaintiff "was not entitled to recover unless the jury were satisfied that the defendant knew of the defect or imperfection in the mill, in its machinery or appurtenances, which produced the injury." The case was thus submitted to them upon the theory that the defendant Fowler, as proprietor of the factory, was responsible to the plaintiff for the injuries sustained by her only upon the ground that the same resulted from his personal negligence or misfeasance. Certainly no exception can be sustained to this charge on the part of the defendant.

But the court below granted a new trial upon the ground that the defendant's motion for a nonsuit should have been granted, and that the case should not have been submitted to the jury. The defendant's counsel moved for a nonsuit at the close of the plaintiff's case, and also at the close of the evidence, which motions were respectively denied, and the defendant's counsel duly excepted. If either application for a nonsuit should have been granted, the error is not cured by the verdict, and a new trial was properly granted. When the plaintiff rested, she had proved the essential facts relating to the injuries, and facts tending to charge the defendant Fowler with actual knowledge of the irregular action of the water-wheel, the effect of the pressure of the wheel upon the east wall, and the probable consequence of the weakening and vibration of the said wall upon the safety of the privy. It was proved that he went at one time into the wheel-pit, and personally directed the work there; that he told the millwright to take a bar and pry up the pillar-blocks into gear, and to make some pegs and wedges and put in behind the blocks, between the blocks and the wall. The proof shows that he was personally cognizant of the acts of the millwright, which probably caused the privy to fall. The witness says: "I told Mr. Fowler it was a hard job to force up the block in that way. He said he thought it would do. The wheel was put

in gear by these wedges driving up the pinion-block." The mode in which the wheel was thus put into gear and made to revolve was clearly improper. Its action was rendered irregular, causing the weakening and shaking of the east wall of the wheel-pit, and the loosening of the foundation and structure of the privy. If this were the consequence of acts directly by, and known to, the defendant,—of which the jury were the proper judges,—certainly he was responsible for the injuries resulting from such acts, upon the ground of his personal negligence or misfeasance. Not that he knew that these acts would, in fact, necessarily render the privy insecure, or would weaken or impair its foundation, but that such might be the consequence. He is chargeable with knowledge of the probable consequence of the acts he directed, or of which he was cognizant.

In this view of the evidence, I do not think the circuit judge would have been warranted in nonsuiting the plaintiff, either at the close of the plaintiff's case, or of the defendant's evidence. The case belonged to the jury upon the evidence tending to charge the defendant with actual, positive misfeasance,—or of doing or directing negligent acts,—careless of or inconsiderate in respect to the consequences liable to result therefrom. It is quite clear and well established that the principal is responsible for injuries resulting to his employees from his personal negligence or misfeasance: *Keegan v. Western R. R. Co.*, 8 N. Y. 175, 181 [50 Am. Dec. 476]; *Ormond v. Holland*, El. B. & E. 102; S. C., 96 Eng. Com. L. 100; *Patterson v. Wallace*, 1 McQueen, 748; S. C., 28 Eng. L. & Eq. 48, 51; *Brydon v. Stewart*, 2 McQueen, 30; *Marshall v. Stewart*, 33 Eng. L. & Eq. 1.

It is difficult to conceive upon what ground it can be questioned that a master is responsible to his servant for injuries resulting from his personal negligence as much as in other relations of men. I cannot concede or imagine that any person is privileged to do injury to others by his personal negligence or misfeasance. All men alike are liable to respond in damages for such injuries; and the relation of master and servant constitutes no exception to the rule. The relation of master and servant involves reciprocal duties and responsibilities. It is the duty of the master as is well stated by the court in *Noyes v. Smith*, 28 Vt. 59, 64 [65 Am. Dec. 222], "to exercise care and prudence, that those in his employment be not exposed to unreasonable risks and dangers; and the servant has

a right to understand that the master will exercise that diligence in protecting him from injury, and also in selecting the agent from which it may arise." In *Ormond v. Holland*, El. B. & E. 102, S. C., 96 Eng. Com. L. 100, it was held that the master would be liable to his servant when the injury resulted from his personal interference with the work of the agent; or in the hiring and retaining of incompetent servants; or in choosing or using of improper implements. In *Patterson v. Wallace*, 1 McQueen, 748, S. C., 28 Eng. Com. L. 50, Lord Chancellor Cranworth, delivering the opinion of the court in the House of Lords, said: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of the workman. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so."

Within the principle asserted in these cases, the defendant Fowler owed it as a duty to the operatives of his factory to provide and keep a safe and secure privy for their resort, or that the privy provided for their use should be safe and secure.

The location of the privy in a dangerous place made it more imperatively his duty to see to it that its foundations were made and kept sound and safe beyond contingency. He had no right to expose the female operatives of his factory to risk and danger in such a place. It was his duty to know that the privy was safe, and that the operatives for whom it was designed and provided might resort to it without personal risk or peril to life or limb. The injury which the plaintiff suffered was not the result of any accident incident to her employment. The servant, doubtless, assumes all the risks which pertain to the business in which he is engaged. The learned judge, at the circuit, correctly charged on this point, that "a person entering the service or employment of another runs all the ordinary risk pertaining to the particular service or employment."

The plaintiff was not called upon to inquire in respect to the safety of the building in question. She could not be expected to know how it was supported, or whether it was or was not safely constructed. It was provided for her use. It was the master's duty to see that it was safe and secure, and not hers to watch and guard by any particular vigilance against accidents of the kind which caused her injury. We

are cited in opposition to this view to the case of *Seymour v. Maddox*, 16 Q. B. 326; S. C., 71 Eng. Com. L. 326. In this case the plaintiff was hired to sing on the stage at the defendant's theater. In passing from her dressing-room to the stage, she fell through an unguarded and unlighted hole in the floor of the theater, and was injured. It was held that the action would not lie, and that the risk was one assumed in her employment. I cannot think that this case was properly decided, or can be sustained upon any sound principle. The learned judges who gave the opinion of the court of common pleas treat the engagement of the plaintiff as an employment on the premises in their actual condition. Judge Erle says: "A person makes his own choice whether he will accept employment on premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light." This girl simply contracted to sing in the theater. She might reasonably expect and assume that the floors of the building were safe, and might be securely passed over. She could not be held, I think, bound to be on her watch or lookout for pit-holes in the floor, and was not called upon, in the course or by the nature of her employment, to guard against accidents from such a cause. I think it was a plain duty which the defendant owed to the plaintiff in that case to provide safe floors in his theater, over which she might securely pass in the performance of her engagement, and that his omission to do so was gross negligence. But if this case were good law, I do not think it conclusive of the present case. The plaintiff in that case passed through a dark passage in the night without a light. This was her own act, and may have been negligence on her part; and the defendant did not require such omission of care on her part, or impose the risk by any necessity in the ordinary course of duty required of the plaintiff. The fundamental error in this case, I think, consists in its not distinguishing between that class of accidents or injuries incident to the work of the agent and those which arise from extrinsic causes. When a person is employed to do a dangerous job of work, or a service of any kind, he assumes all the perils which belong to the work itself; and he must be held to take all the risks which grow out of, or are in any way connected with, or pertain to, the performance of the duties he has assumed to discharge. Against such risks and accidents he may, and he must, take proper precautions for himself at his peril, and is

his own insurer. But this rule does not, and should not, apply to accidents or injuries resulting from extrinsic causes and circumstances which cannot be foreseen by him, and which by the exercise of ordinary care and caution he could not anticipate or prevent.

This distinction is well illustrated by the case of *Marshall v. Stewart*, 33 Eng. L. & Eq. 1. In this case the action was brought by the widow and children of a miner killed in the employment of the defendant from the falling of a stone from the top of the shaft of the mine as he was coming out,—the planking then being in an unsafe state. Lord Chancellor Cranworth, in delivering the opinion of the House of Lords, said: "It was, unquestionably, the duty of the master,—*quo master*,—in his capacity of master, to take him up safely just the same as to have brought him down safely"; and that the injury happened to this man from the neglect of the master while he was sustaining the character of master to him. The injury here, and in the case of *Seymour v. Maddox*, 16 Q. B. 326, S. C., 71 Eng. Com. L. 326, as with the case now before this court, arose from causes extrinsic to the work in which the servant was engaged. It was not the duty of the servant to guard, in the case of *Marshall v. Stewart*, 33 Eng. L. & Eq. 1, against the unsafe planking of the entrance to the mine, or against holes in the floor in *Seymour v. Maddox*, *supra*, or in this case, against the insecurity of the privy. The proprietor of the mine, of the theater, and of the factory, in these cases, provided a place in which the servant was to be employed, and were respectively bound to take proper care not to subject them to unreasonable risks and dangers from causes beyond their control: *Noyes v. Smith*, 28 Vt. 68 [65 Am. Dec. 222]; *Hilliard on Torts*, 563; *Wigmore v. Jay*, 5 Ex. 352; *Perry v. Marsh*, 25 Ala. 659.

The motions for nonsuit were properly denied, and the judgment of the general term should be reversed, and that of the special term affirmed.

All the judges concurred.

Judgment accordingly.

EMPLOYER IS BOUND TO USE ALL REASONABLE PRECAUTIONS FOR SAFETY of those in his service: *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 212, 216, note.

ASSUMPTION BY SERVANT OF RISKS INCIDENT TO SERVICE: See *Murray v. S. C. R. R. Co.*, 36 Am. Dec. 281, extended note; *Illinois Cent. R. R. Co. v. Cox*, 71 Id. 298; *Noyes v. Smith*, 65 Id. 222, 225, note.

THE PRINCIPAL CASE IS CITED in support of the general rule that for injuries sustained by the servant in his master's employment, an action lies, if the injury was caused by the personal fault, negligence, or misfeasance of the master, in *Faulkner v. Erie R'y Co.*, 49 Barb. 327; *Warner v. Erie R'y Co.*, Id. 568; *Connolly v. Poillon*, 41 Id. 369; *Bailee v. New York etc. R. R. Co.*, 62 Id. 629; S. C., 5 Lans. 442; 12 Abb. Pr., N. S., 316; *Gibson v. Erie R'y Co.*, 5 Hun, 33; *Beck v. East River Ferry Co.*, 6 Robt. 93; *Gilman v. Eastern R. R. Co.*, 13 Allen, 442. It is cited to the point that the master is chargeable with knowledge of the probable consequences of the acts he directed, or of which he was cognizant, in *Brickner v. New York Central R. R. Co.*, 2 Lans. 513; *Warner v. Erie R'y Co.*, 39 N. Y. 477; to the point that it is the duty of the master to provide his servants with proper, suitable, and safe structures, machinery, other materials, and appliances necessary for the proposed work, in *Williams v. Delaware etc. R. R. Co.*, 39 Hun, 432; *Boyce v. Fitzpatrick*, 80 Ind. 529; *Barrett v. Singer Mfg. Co.*, 1 Sweeny, 548; *Plank v. New York etc. R. R. Co.*, 1 Thomp. & C. 323; to the point that if the servant engage with knowledge of the dangerous character of the employment, he will be deemed, in the absence of any qualifying facts, to have contracted with reference thereto, and to have assumed the risks incident to the service, in *Cruty v. Erie R'y Co.*, 3 Thomp. & C. 247; *De Graff v. N. Y. etc. R. R. Co.*, Id. 257; *Span v. Ely*, 8 Hun, 257; and is cited on the question of contributory negligence, in *Lanum v. Albany Gas Light Co.*, 46 Barb. 269.

STURTEVANT v. ORSER.

[2d NEW YORK, 583.]

TITLE OF VENDOR OF GOODS IS SUPERIOR AND WILL PREVAIL, where the goods had come to the possession of the vendee, and ascertaining his insolvency, he deposited them in warehouse subject to the order of the vendor, and notified him thereof by letter, although before the vendor had signified his assent the goods were attached by another creditor.

ACTION for the recovery of oil sold by the plaintiff to one Wing, and delivered on board the latter's vessel at New Bedford for transportation to New York. Before the oil arrived, Wing became insolvent, and on its arrival he directed it stored for the plaintiff, with the defendant, writing the plaintiff what he had done, stating that he had stored the oil subject to the plaintiff's order on paying charges and freight. This letter was received by plaintiff's clerk the same evening, and using due diligence he ascertained where the oil was stored, and telegraphed an agent in New York to take charge of it for the plaintiff; but before the receipt of the telegram by the agent, the oil was attached by a creditor of Wing. The plaintiff, by his agent, then demanded the oil, offering to pay charges and freight; but the warehouseman refused its delivery, and this action was commenced. On the trial, a

verdict was directed for the plaintiff for the value of the oil, subject to the opinion of the supreme court at general term. The court at general term rendered judgment for the plaintiff, finding, as a conclusion of law, that Wing had no property in the oil when the attachment was served, and defendants appealed.

W. Bliss, for the appellants.

E. Terry, for the respondent.

By Court, SMITH, J. The delivery of the oil on board the vendee's ship, at New Bedford, was unquestionably a delivery to Wing, and vested the property in him. The property, it is true, was to be transported to New York for sale, but it was to be transported by the vendee himself, who could have changed its destination, or sold it absolutely on shipboard. After such delivery, it was not subject to stoppage *in transitu*, for it was not in the hands of a carrier or middleman: *Ingles v. Usherwood*, 1 East, 515; *Turner v. Trustees of Liverpool Docks*, 6 Eng. L. & Eq. 515; *Ogle v. Atkinson*, 5 Taunt. 759.

But if this were not so, the vendee could not exercise the right of stoppage *in transitu*, and the vendor made no attempt to do so: Story on Constitution, sec. 816. The plaintiff's right to recover the oil must, therefore, be put upon other grounds to be sustained.

The case is quite parallel to that of *Atkin v. Barwick*, 1 Strange, 165. In that case, the defendants were mercers, living in London; and Cripps & Co., the assignors of the plaintiff, were traders at Penoyer, in Cornwall. On the 7th of April, 1715, the defendants, upon the order of Cripps & Co., sent them the goods in controversy, and gave them credit on their books for the amount. On the 18th of May, Cripps & Co., without the knowledge of the defendants, deposited the goods with a third person, for the use of the defendants. On the 6th of June, Cripps & Co. wrote a letter to the defendants, stating that their affairs were in a bad condition, and that for that reason they thought it not reasonable that the last goods should go to other creditors; and that they had, therefore, not entered them in their books, but left them with a Mr. Penhallow, who had orders to deliver them to the defendants. On June 9th, a commission of bankruptcy was issued against Cripps & Co., and their effects assigned to the plaintiffs.

The letter of Cripps & Co. to the defendants was not received by them till the 13th of June, which was the first notice they

had of the delivery to Penhallow; and they immediately signified their consent to take the goods again. This case, in all its essential particulars, is like the present case. The goods, as in this case, were delivered to, and the title vested in, the vendee; they were deposited with a third person by the vendee for the use of the vendor before the rights of creditors attached, and written notice of such deposit, and of the failure of the vendee given to the vendor, and the goods actually attached before the vendor attempted to reclaim them. In the decision of the case of *Atkin v. Barwick*, 1 Strange, 165, the chief justice held that "the delivery to Penhallow to the use of the defendants before the act of bankruptcy, and grounded on a good consideration, transferred the absolute property to them." Fortescue, J., said that payment in satisfaction of the debt was a good consideration, and "we will intend an acceptance till the contrary appears." Eyre, J., said: "The precedent debt is a sufficient consideration, and it vests before notice [the title, he means], for it being to his benefit, a disagreement shall not be presumed." I have quoted this case thus fully because it is a leading one, and if good law, is quite conclusive of the case now under consideration. This case of *Atkin v. Barwick*, 1 Strange, 165, has been much discussed, and much questioned, but not in any case overruled. In *Harman v. Fishar*, 1 Cowp. 125, Lord Mansfield said of it, that "with respect to the case of *Atkin v. Barwick*, *supra*, the judgment seemed right, but the reasons wrong." In *Neate v. Ball*, 2 East, 117, Lord Kenyon discussed it, and said that Lord Mansfield had extracted the true ground on which that judgment, if it did not proceed, ought to have proceeded; namely, that the trader, finding himself in failing circumstances, very honestly did not accept the goods, but returned them.

But this distinction is obviously unsound and untenable. The bankrupt had the goods in possession for some time. They were sent him the 7th of April, and were in his possession and sent by him for deposit with the third person on the 18th of May, more than forty days after being delivered to the vendee, or to the carrier for him; and were in his actual possession when so deposited. The title to them had absolutely vested before such deposit. They were not intercepted by the way, or the order of purchase countermanded before the actual receipt of the goods. But Lord Kenyon and the whole court of king's bench did recognize the case of *Atkin v. Barwick*, 1 Strange, 165 as sound law, in *Salte v. Field*, 5 Term Rep. 211.

Speaking of the case under consideration, Lord Kenyon there said: "I cannot distinguish this case from *Atkin v. Barwick* on principle; for in that case there had been a delivery of the goods by the seller, with the concurrence of all the parties interested. But the agreement of the parties to rescind that contract put an end to the sale, as if it had never taken place." Ashhurst, J., said: "The case in *Strange* applies to the present case." Buller, J., said: "The principle on which the case of *Atkin v. Barwick* was decided governs this." In *Smith v. Field*, 5 Term Rep. 402, the same court again affirmed the case of *Atkin v. Barwick*, *supra*, and recognized it as sound law. The case has also been questioned in our courts. In *Berly v. Taylor*, 5 Hill, 581, Judge Bronson discusses it, and after referring to the various cases, says of it that, "although it seems never to have been overruled, it would be difficult to support it upon principle, without altering some of the facts." But this was in a dissenting opinion. And in the same case, Judge Cowen, who gave the opinion of the court, considers and discusses the case, and declares that it has never been overruled, adopts its reasoning, and affirms the principle upon which it was decided, as the same learned judge had done before in *Ash v. Putnam*, 1 Hill, 310, where there was no dissent to the decision or opinion. Speaking then of the case of *Atkin v. Barwick*, 1 *Strange*, 165, he says: "There was either a resale or rescission, or a refusal by the vendee to accept. Call it which you please, the effect is the same. In one case, the property is revested in the vendors; in the other, it was never divested."

The difficulty in all the class of cases like the present has been to fix the point of time when the title of the vendor became revested. The right of rescission, or resale, is undoubted; but the question is, whether the rescission or resale is consummated before the assent of the vendor to such rescission or resale is actually given or expressed. The moment the minds of the vendor and vendee meet on the question, it is conceded, the contract is rescinded, or the property resold and the title revested. If the vendor was present at the same place with the vendee, delivery to him by the vendee in relinquishment of the contract of purchase, would, of course, completely restore him to his original rights of property; but when the vendor and vendee live in different places, it has been claimed in many cases that the purpose of the vendee to restore the property was ineffectual, till the consent of the vendor to the

rescission of the contract was given, and that, intermediate that period, the title remained in the vendee, and was subject to attachment or execution at the instance of his creditors. That is the precise question now presented in this case.

Upon the principles which apply to sales, it is abstractly true that no title can pass till the bargain is complete, and that a contract is not consummated till the minds of the parties meet; and strictly this rule must also apply to agreements for the rescission of a contract. It is only upon the doctrine of relation in such cases that the title can be held to pass at the time of the delivery of the goods to the third person. This doctrine is generally alleged to apply in cases of trusts; and it is upon this ground that the title can be held to pass at the moment the trust is created, as with cases of assignments in trust. Lord Mansfield, in *Alderson v. Temple*, 4 Burr. 2239, puts the case of *Atkin v. Barwick*, 1 Strange, 165, on the proper ground. He said: "The court of chancery would have interposed, and said 'the assignees should not have the goods without paying the price.' I think the determination was right; and there was an actual delivery to a person who became a trustee."

The direction to hold in trust for the vendor and to deliver to him, accompanied by a delivery to the warehouseman, as was done in this case, and that of *Atkin v. Barwick*, *supra*, is a parol transfer or assignment of the property to the vendor, and vests the property. The doctrine of relation in such case, Judge Cowen says, in *Berly v. Taylor*, 5 Hill, 581, applies to a delivery of goods in trust. The delivery was held, he says of *Atkin v. Barwick*, 1 Strange, 165, to vest the property of the goods in them (the vendors) immediately, subject to be divested by the dissent. This was on the ground that the trust was beneficial, and the presumption was allowed, although the vendors at the time knew nothing of the transaction.

This, I think, presents the true ground upon which the plaintiff's claim may securely rest. The delivery of the oil to Kelly, with direction to deliver it to the plaintiff, was a delivery by Wing to the plaintiff, and vested the title in him, unless he expressly disaffirmed the trust in his favor. The trust was irrevocable by Wing. He parted with all claim in or title to the property. He did all in his power to restore the property to the vendor. He acted with an honesty which ought to be encouraged and commended, not overreached and nullified by any manner of technical rules at variance with equity and common justice.

But the plaintiff's title to this oil can be sustained upon the narrow ground mentioned by Lord Mansfield in *Harman v. Fishar*, 1 Cowp. 125, and stated by Lord Kenyon in *Neate v. Ball*, 2 East, 124, that the vendee "did not accept the goods." Wing, in this case, before the goods arrived in New York, refused to take them upon the purchase, provided for their storage with Kelly and delivery to the plaintiff, and immediately advised the plaintiff of the fact. Wing then had the goods under his personal control after they arrived at their place of destination. He restored them to the plaintiff in the only way practicable under the circumstances.

I think the judgment below right, and that the same should be affirmed.

DENTO, J., delivered a concurring opinion.

All the judges concurred in the judgment.

VENDOR'S RIGHT OF STOPPAGE IN TRANSITU: See *Chandler v. Fulton*, 69 Am. Dec. 188; *Sawyer v. Joslin*, 49 Id. 768; *O'Brien v. Norris*, 77 Id. 284.

WHEN TITLE TO GOODS SOLD PASSES TO VENDEE: See *Hall v. Richardson*, 77 Am. Dec. 303, and cases collected in note 310; *Wade v. Moffett*, 74 Id. 79; *Sewell v. Eaton*, 70 Id. 471, and note 473.

THE PRINCIPAL CASE IS CITED ON the question of rescission of contract, in *Blanchard v. Trim*, 38 N. Y. 228, holding that the idea of rescission is appropriate, where the title of the vendee has not been perfected for any reason, where there has not been a perfect delivery, where fraud has occurred, or where the contract, in any respect, remains executory. It is cited to the point that an election on the part of a vendee to return goods not paid for, and his delivery of them to a carrier for that purpose, reinvests the vendor with title to the goods, in *Sutton v. Crosby*, 54 Barb. 83. So it is cited in support of the rule that the circumstances of a sale on credit, and delivery to a common carrier, qualified by the right of reclamation, in case of the failure of the purchaser, not only reserve the right of stoppage *in transitu* to the vendor, but leave a *locus penitentie* to the debtor to decline to be guilty of accepting the property from the carrier, with knowledge of his inability to pay for it, in *Clark v. Lynch*, 4 Daly, 83. See also to same effect, *Clark v. Bartlett*, 50 Wis. 547, citing the principal case.

DUBOIS v. BEAVER.

[35 NEW YORK, 128.]

ACTS OF TRESPASS PRIOR TO EARLIEST DAY LAID IN COMPLAINT may be proved under the New York statute, though trespasses laid under a *continuando* have already been proved.

VARIANCE BETWEEN ALLEGATION AND PROOF IS TO BE DISREGARDED, under the New York code, unless it appears to have misled a party to his prejudice.

SINGLE DAMAGES ARE RECOVERABLE FOR TRESPASS, which proves to be casual or involuntary, though the complaint was in form for treble damages, under a statute allowing such damages for willful trespass.

TREE GROWING NEAR DIVISION LINE SO THAT ITS ROOTS EXTEND ON EACH SIDE is wholly the property of him on whose property the trunk stands, *semble*.

TREE, TRUNK OF WHICH IS DIVIDED BY BOUNDARY LINE, belongs to the adjoining proprietors as tenants in common, *semble*.

TRESPASS FOR DESTRUCTION OF LINE TREES lies by proprietor of land against adjoining proprietor, whether the plaintiff's interest be several or as a tenant in common.

ACTION for treble damages for cutting down and carrying off trees, which stood in the line of the division fence between plaintiff's and defendant's lands. Verdict was for plaintiff, and defendant appealed.

Marius Schoonmaker, for the appellant.

E. Cooke, for the respondent.

By Court, ALLEN, J. Although the trespasses were laid with a *continuando*, and several acts of trespass within the time alleged had been proved, the plaintiff was properly allowed to prove another act anterior to the day stated in the complaint as the commencement of the trespasses. The rule was otherwise at common law, for the reason that a variance between the declaration and proof was fatal. It was then required that the first day should be laid anterior to the first wrongful act, because the plaintiff would not be permitted to give in evidence repeated acts of trespass, unless committed during the space of time laid in the declaration: 1 Chitty's Pleadings, 894. But he might prove a single act of trespass upon the first day named in the complaint: *Hume v. Oldacre*, 1 Stark. 351. In such case, he was confined to that act, and the averment of the several trespasses after the first day named was treated as surplusage, and disregarded, when the day specified was regarded as an allegation of time not necessary to be proved as laid, and not as descriptive of the offenses: *King v. Franklin*, 5 Price, 614. So long as the averment in *continuando* was relied upon, and regarded as a part of the declaration, it was necessarily made a part of the statement of the causes of action; and any evidence of acts not embraced within the description was inadmissible, upon the ground of variance. The evidence could not differ from the statement of the cause of action. The objection had no other foundation in principle; and this is obviated by sections 169 and 170 of the code, which

reject all variance between the allegation in a pleading and the proof, unless it has actually misled a party to his prejudice; which was not claimed upon the trial of this action.

The action was in form to recover treble the amount of damages which should be assessed by the jury for the trespasses complained of; but upon the trial, the plaintiff only claimed to recover single damages; the action was treated as an ordinary action of trespass, and the plaintiff has only taken judgment for single damages. The question was not made upon the trial which is attempted to be made here, that trespass for cutting line trees, or trees standing upon the division line between the plaintiff and defendant, was not within the statute giving treble damages for willfully cutting down timber or trees on the land of any other person, without the consent of the owner. The plaintiff could waive his claim for treble damages, under the statute, and if he did so, or if it appeared upon the trial that the trespass was casual or involuntary, or that the defendant had reason to believe that the land on which the trespass was committed was his own, the verdict would necessarily be, as it was in this case, for single damages, or for a single trespass. To have entitled the plaintiff to treble damages, the jury must have found the defendant guilty of the trespass alleged, and assessed the single value of the timber or trees cut, and the court, on motion, would have trebled the damages: 3 R. S., 5th ed., 624; *Newcomb v. Butterfield*, 8 Johns. 342. The reference, therefore, to the statute may be regarded as out of the complaint; and the right of the plaintiff to recover for the cutting of the line trees be considered as if the action was in form, as it was in fact as tried and determined, a simple action of trespass *quare clausum fregit*.

It is not necessary to determine whether the parties were technically tenants in common of the trees growing upon the boundary line separating their respective farms, with all the ordinary rights and incidents of such an estate. The trees thus growing are called, in the case, "line trees." By this, I understand, is meant, not trees marked and set apart by the parties as evidences or monuments of the division line, but trees deriving their nourishment from roots extending on both sides of the line, and with bodies so directly over the line, and necessarily on both sides of that line, that it could not be determined upon which side of the line the tree was originally planted; as was the case in *Holder v. Coates*, 1 Moody & M. 112. Different opinions have been held as to the rights of the own-

ers of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other; some holding that, in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates: *Waterman v. Soper*, 1 Ld. Raym. 737; *Griffin v. Bixby*, 12 N. H. 454 [37 Am. Dec. 225]; 2 Bouv. Inst. 158; while others, with better reasons, as it seems to me, hold that the tree is wholly the property of him upon whose land the trunk stands: *Holder v. Coates*, 1 Moody & M. 112; *Lyman v. Hale*, 11 Conn. 177 [27 Am. Dec. 728]; *Masters v. Pollie*, 2 Rolle, 141; Crabbe on Real Property, sec. 96. The same reasons, and the proprietorship of the soil, would give to the owner of the estate that part of the trunk of a tree which was upon or over his land, when the trunk was divided by the line separating the estates. The ownership of the soil would be several, in the proprietors of the two estates, while the tree, standing and growing partly upon the soil of each, not capable, as an entire thing, of several ownership by the two, would be the property of the two in common, and as tenants in common. If a tree grows in a hedge that divides the land of A and B, and by its roots takes nourishment in the land of both, they are tenants in common: *Anonymous*, 2 Rolle, 255; Crabbe's Law of Real Property, *supra*.

The same difficulty and conflict of opinions upon this branch of the law has also existed in the civil law, and in France the difficulty has been avoided by legislation, and boundary hedges, and the trees in them are declared to be common property of the owners of the two estates: Note to *Holder v. Coates*, 1 Moody & M. 112; S. C., 22 Eng. Com. L. 265. So long as neither can make title upon any principles of right known to the law, to the exclusion of the other, a common property necessarily exists in both, and the rule of the French code is but the rule of the common law resulting from the principle which gives to the owner of the soil an exclusive right to an indefinite extent upward and downward, and which makes trees and bushes growing and being upon land a part of the land itself. Trees thus standing upon the boundary line as metestones or monuments set up for marking the boundary line are not like party-walls erected with reference to the usual occupation of adjacent premises. The wall is erected for the use of each, and each may use it, and each owns that which is on his own premises, but there is no tenancy in common:

Matts v. Hawkins, 5 Taunt. 20. This case was, however, decided under the party-wall act of 14 Geo. III., c. 78, and it would seem that but for such act the presumption would be that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moieties as tenants in common: *Cubitt v. Porter*, 8 Barn. & C. 257.

Ordinarily, trespass will not lie by one tenant in common against his co-tenant, but when one tenant in common ousts his co-tenant, ejectment will lie at the suit of the latter; and when one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party: Co. Lit. 200 a, 200 b; Crabbe's Law of Real Property, sec. 2318 b; *Waterman v. Soper*, 1 Ld. Raym. 737. If one tenant in common destroy the thing in common, as if he grub up and destroy a hedge, or prevent his co-tenant of a folding erecting hurdles, trespass lies: Browne on Actions, 414; *Voyce v. Voyce*, Gow, 201; *Cubitt v. Porter*, 8 Barn. & C. 257. If one tenant in common enter upon his co-tenant and oust him of his premises, trespass *quare clausum fregit* lies for the injury: *Erwin v. Olmsted*, 7 Cow. 229. Here, there was a total destruction of the trees, and the plaintiff had his remedy by action for the wrong done. If the parties were not tenants in common, the defendant was clearly a trespasser in cutting and carrying off that portion which belonged to the plaintiff in reality as being upon his land.

The judgment must be affirmed.

DAVIES, J., also delivered an opinion for affirmance.

Judgment affirmed.

TREES GROWING ON OR NEAR BOUNDARY LINE, AND RIGHTS OF ADJOINING PROPRIETORS. — In *Waterman v. Soper*, 1 Ld. Raym. 737, it was held that a tree belongs to him on whose soil the roots grow. But in *Hoffman v. Armstrong*, 48 N. Y. 203, S. C., 11 Am. Rep. 537, the court, citing the principal case, say that a tree is the property of him on whose land the trunk stands; and in *Skinner v. Wilder*, 38 Vt. 115, it is said that the proprietorship of the tree should be determined rather by the latter rule than by the position of the roots or branches. In *Holder v. Coats*, Moody & M. 112, the rule is laid down that if the roots extend into the land of another, the tree still belongs to the owner of the land on which it was first planted, for, as it is held in *Masters v. Pollie*, 2 Rolle, 141, a proprietor "cannot limit the roots of his tree, how far they shall grow and go." Trees standing upon the dividing line between property, and receiving nourishment from the soil on each side of the line, have been held to be common property: *Waterman v. Soper*, 1 Ld. Raym. 737; *Anonymous*, 2 Rolle, 255; *Griffin v. Bixby*, 12 N. H. 454. In *Rehys v. Beaver*, 32 Barb. 547, it is said that whether common property or

not, trespass will lie by one owner against the adjoining owner for cutting such trees. In *Lyman v. Hale*, 11 Conn. 182, it is held that overhanging branches or penetrating roots will not constitute one a joint owner in a tree; nor will they give the adjoining owner any right or title to any part of the tree, its branches, or its fruit: *Hoffman v. Armstrong*, 46 Barb. 339, affirmed in 48 N. Y. 203; S. C., 11 Am. Rep. 537, citing the principal case; and he will be liable in trespass for taking such fruit: *Skinner v. Wilder*, 38 Vt. 115; *Lyman v. Hale*, 11 Conn. 177; or for an assault and battery in using violence to prevent the owner from picking the fruit, if he can do so without committing a trespass: *Hoffman v. Armstrong*, *supra*. If annoyed by overhanging branches, it is said that the adjoining owner may treat them as a nuisance, which he would have a right to abate: *Lyman v. Hale*, 11 Conn. 177. In this regard, *Grandons v. Loudal*, 11 Pac. Rep. 623 (Cal.), follows the rule laid down in Wood on Nuisances, sec. 112, which is to the effect that "trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent, they are technical nuisances, and the person over whose land they extend may cut them off, or have his action for damages, if any have been sustained therefrom, and an abatement of the nuisance against the owner or occupant of the land on which they grow, but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil." But the fact that branches of a tree, not poisonous or noxious, overhang another's land, does not of itself constitute them a nuisance, so as to authorize an action therefor, unless real and sensible damages have been suffered: *Countryside v. Lighthill*, 24 Hun, 405-407. The adjoining proprietor may nevertheless clip the branches if the owner refuses to do so when requested: *Id.* A person planting poisonous trees on his land near the division line so that they grow over the line, and are eaten by the cattle in the adjoining owner's land, is liable to the owner of the cattle, if they are injured or die, and this whether the defendant knew the character of the tree or not: *Cronkurst v. Am. Burial Board*, 39 L. T., N. S., 355.

THE PRINCIPAL CASE IS CITED IN *Richeson v. Northrup*, 66 Barb. 87, to the point that in trespass, where the injury is a continuing one, the allegation may be that a trespass was committed on a certain day, and divers other days, and recovery could be had for such injury as could be proved prior to the day alleged; and in *Starkweather v. Quigley*, 7 Hun, 29, to the point that in trespass alleged to be willful, if its character as such cannot be proved, the plaintiff may waive his claim for treble damages, and recover single damages.

MEADS v. MERCHANTS' BANK OF ALBANY.

[25 NEW YORK, 142.]

CERTIFICATION OF CHECK AS GOOD, BY AUTHORIZED OFFICER OF BANK, binds the bank to keep funds to pay it; it is equivalent to the acceptance of a bill of exchange payable on demand, and makes the bank primarily liable to the holder until discharged by payment, release, or the statute of limitations.

CERTIFICATION AS GOOD OF NOTE PAYABLE AT BANK, where the course of business between banks is, instead of actually paying the notes of customers when in funds on presentment, to mark them as good, and settle

in the exchanges of the next day, has the same effect as has the certification of a check, and operates as an absolute engagement of the bank to pay its own debt, and not as a guaranty or promise for the benefit of a third person.

BANK IS LIABLE ON NOTE FALSELY CERTIFIED BY TELLER, the bank not having funds for its payment, to such persons only as hold in good faith and for value.

HOLDER OF NOTE CERTIFIED BY BANK TELLER AS GOOD, THOUGH FALSELY, the bank not having funds for its payment, is entitled to recover if he, being ignorant of the falsity of the certificate, treats it as payment, and omits to charge indorsers.

DELAY BY HOLDER OF NOTE CERTIFIED BY BANK AS GOOD to obtain actual payment at the request of the maker, and for his accommodation, will not discharge the obligation arising from the certificate.

ACTION upon defendant's certificate of deposit for five thousand dollars. Defendant, by way of counterclaim, set up a demand upon a check of J. B. Plumb upon the Bank of the Interior, of which plaintiff was receiver, for four thousand dollars, certified by the teller as good, and also a note of said Plumb for five thousand dollars, likewise certified as good by said teller. The remaining facts appear in the opinion.

Amasa J. Parker, for the appellant.

William H. Learned, for the respondent.

By Court, SMITH, J. Upon the findings of the referee, upon the facts that the practice of certifying checks by the teller of the Bank of the Interior was openly done, in the usual course of business, with the knowledge of the officers of the bank, and such checks uniformly dealt with and treated as obligatory of the bank, his conclusion of law that such teller had authority to certify checks and notes, can hardly be doubted, and is clearly correct, though it is more properly an inference of fact than of law.

Assuming, therefore, that the teller was duly authorized to certify checks and notes, when presented at the counter of the bank, in the ordinary course of business,—which is clearly, as far as such authority can be implied from custom, or allowed, without distinct proof of more extensive power specially committed to him,—the facts in respect to the liability of the bank upon the four-thousand-dollar check and the five-thousand-dollar note present different questions, which should be separately considered.

The four-thousand-dollar check, it appears, was drawn, and certified good by the teller, before its delivery to the defendant.

When it was presented to the teller for his certificate in respect to its goodness, the account of Plumb, the drawer, was in fact good for an amount exceeding the sum specified in this check. It was, therefore, not improper for the teller to certify this check. His certificate that it was good was a true representation of the state of the account of Plumb with the bank, and bound the bank to hold and retain the amount for which the check was drawn, to meet it, on presentation by any person by whom it might be held. It was equivalent to the acceptance of a negotiable bill of exchange, in favor of the holder, for that amount, by the bank: *Farmers' and Mechanics' Bank of Kent Co. v. Butchers' and Drovers' Bank*, 16 N. Y. 128 [69 Am. Dec. 678].

The defendants received this check for value. The referee finds that they gave up to Plumb, at the time of the delivery of the check, eight bonds of the Milwaukee and Mississippi Railroad Company, which were then held by them as collateral to two notes of Plumb, and were worth the amount which Plumb then owed them on his said notes, being three thousand five hundred dollars and interest, from the 1st of January previous; that the check was received and held by the defendant in lieu of said bonds, and as security for the payment of the balance due on the said two notes of Plumb.

When the check was so delivered to the defendants by Plumb, he requested that it should not be sent into the Bank of the Interior, among the exchanges; and such check was not presented to the bank for payment till its failure, which, it appears from the pleadings, occurred in the spring of 1861, the plaintiff being appointed receiver on the 21st of May, 1861. The check is dated March 6, 1858, and was thus retained by the bank, in hand, upwards of three years.

Upon this statement of the facts, it is quite clear that this check was not received by the defendants in the ordinary course of business. It was payable on presentation; it was equivalent to cash; it was a mere substitute for so much money in bank. It is foreign to the whole office and design of a check to take and receive it to be held as security, as much as it would to take the same amount in bank bills or coin. When the defendants took this check to hold as security for Plumb's debt, and agreed not to send it in with the exchange, they knew this was a departure from the usual course of business in respect to checks. If, therefore, it was essential to the plaintiff's right to enforce this check as an

accepted bill by the Bank of the Interior, that they should have received it in the ordinary course of business, clearly the defendants could not succeed. They clearly did not so receive it.

But I do not think the defendants' right to recover, upon this check, depends upon this condition. The check was, in fact, drawn upon funds in bank, and was accepted, with funds in hand, by the bank. The indorsement, by its teller, upon the check, that it was good, immediately bound the bank to pay it, thereafter, on presentation. It was then an accepted bill, with funds in the hands of the acceptor. It was not an accommodation bill; the bank, having accepted the check, became the principal debtor and was bound to keep the funds to meet it. A liability, once incurred, remains until it is discharged, by payment or release. I can see no principle upon which it can be held that the Bank of the Interior ever discharged its obligation to pay this check, or became in any way released therefrom. Lapse of time would not effect such discharge, till the statute of limitations should attach. In the case of *Farmers' and Mechanics' Bank of Kent County v. Butchers' and Drovers' Bank*, 16 N. Y. 128 [69 Am. Dec. 678], the checks were dated February 16, 1852, and certified on their face immediately. They were applied in payment of installments due upon a subscription to stock, and afterwards deposited as collateral security and held till February, 1853, before they were presented for payment. It was not considered that delay in their presentation affected the question of the liability of the bank to pay them. Indeed, Judge Comstock, who dissented from the opinion of the court, said that the court below had regarded these acceptances as payable on demand; and for that reason, the delay in presentation was considered no objection to a recovery against the acceptor. "In my judgment," he said, "the court was clearly right in this construction, and right also in the consequence drawn from it, that the certificates, as an acceptance, if duly authorized, are obligations, as in other cases, until paid, or the statute of limitations should attach as a bar." I do not see, therefore, upon what principle the judgment below, so far as relates to the four-thousand-dollar check, can be disturbed.

The question in regard to the note stands upon somewhat different ground.

The presentation of the note at the counter of the bank on its maturity for payment, was in the ordinary course of busi-

ness; and so was the making of the certificate then and there indorsed by the teller, certifying that the same was good. The legal effect and force of such certificate was, that the maker had deposited funds in the bank to meet said note, and that the bank then held the same in deposit for that purpose, and would pay the amount upon request. The course of business among the banks at Albany was such as to make such presentation and indorsement equivalent to payment of the note by the maker, and the substitution of the Bank of the Interior as the debtor of the defendants for the amount of the note payable, in fact, in the exchanges on the next day. But the indorsement was, in effect, an absolute engagement on the part of the Bank of the Interior to pay the note, and dispensed with protest or steps to charge the indorser, as much so as if the defendant had actually received the cash on the presentation of the note, instead of taking the certificate of the teller that the note was good. This certificate was in fact false, and made by the teller in violation of his duty, and in fraud of the bank of which he was an officer. But it is found by the referee that the defendant was ignorant of this fact, and did not know, when said note was so presented and certified, that the account of the said Plumb with the Bank of the Interior was not good for the amount of the note.

The defendant was induced by Plumb to hold on to the note after it had been so certified, and not send it in for payment the next day with their exchanges. But I cannot see that this fact affects their rights any more than did delay in the presentation of the four-thousand-dollar check. The bank had become the principal debtor, and could not be discharged without payment or release, if the defendants are otherwise entitled to hold them responsible for the note. The defendant clearly cannot hold the Bank of the Interior responsible upon the false certificate of its teller, except upon the ground that it is a holder of it for value, and received the same in good faith. In this particular, the case stands upon the same ground with the case of the *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 128 [69 Am. Dec. 678]. In that case, the certificate was false and fraudulent, and the question was, whether the defendants were liable, and it was held that the plaintiffs being *bona fide* holders for value, were entitled to recover. In this case, it appears that the defendants having presented the note, and obtained the certificate that it was good, took no measures to charge the indorser or

enforce payment of the maker till he failed, "refraining from these acts" as the referee finds, "in reliance upon said certificate."

This relinquishment of the security of the indorser, and the taking of this certificate in payment of the note, makes the defendants *bona fide* holders of it for value, within the case of *Youngs v. Lee*, 12 N. Y. 554, and the cases on this subject: *Stalker v. McDonald*, 6 Hill, 93 [40 Am. Dec. 389]; *Bank of Salina v. Babcock*, 21 Wend. 499; *Pearsall v. Post*, 20 Id. 115.

The statute of frauds has nothing to do with this question. The force of the certificate indorsed on the check and note, in both cases, is an admission of funds in hand to meet the check and note, and an agreement to pay such funds on presentation of the note or check. It is not an engagement to pay the debt of another; but upon its face, the engagement, in legal effect, to pay their own debt to the party entitled to it. The case of *Farmers' and Mechanics' Bank of Kent County v. Butchers' and Drovers' Bank*, 16 N. Y. 128 [69 Am. Dec. 678], answers this and all the other objections raised to the right of the defendants to recover upon this check and note.

I see no ground upon which the judgment can be interfered with by this court, and think it should be confirmed.

DENIO, C. J., and DAVIES, SUTHERLAND, and ALLEN, JJ., concurred.

WRIGHT, J., filed a dissenting opinion, GOULD, J., concurring.

Judgment affirmed.

CERTIFICATION OF CHECKS, AND EFFECT OF FALSE CERTIFICATION BY PROPER OFFICER: See *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 69 Am. Dec. 678, and note 691. The certification of a check is to be regarded as an acceptance thereof to pay on demand, and is obligatory until paid, or the statute of limitations attaches as a bar: *Nolan v. Bank of N. Y. Nat. Bank Ass'n*, 67 Barb. 33; *Knickerbocker v. People*, 43 N. Y. 177; and admits the genuineness of the signature of the drawer, and that there are funds for its payment: *Marine Nat. Bank v. National City Bank*, 59 Id. 77; and operates as an original agreement to pay such funds on presentation of the check, and not simply as an engagement to pay the debt of another: *National Com. Bank v. National Mech. Bank*, 3 Jones & S. 294. It obligates the bank to hold so much of the drawer's credit or funds as is necessary to meet the check when it shall be presented: *Stevens v. Corn Exchange*, 3 Hun, 151; S. C., 48 How. Pr. 355; and 3 Thomp. & C. 287; *Freund v. Importers' & T. Bank*, 12 Hun, 540; *First Nat. Bank v. Leach*, 52 N. Y. 352. Though the certification of a check by the proper officer be false, the bank will be liable thereon to a *bona fide* holder: *Bank of New York v. Bank of Ohio*, 29 Id. 632; *Irving Bank v. Wetherald*, 36 Id. 337; and any one who has paid value for the check, or on the

credit thereof has relinquished some available security or valuable right, or has expressly asserted some new legal obligation, is a holder for value, although the paper is available to him as security for a pre-existing debt: *Traders' Bank v. Bradner*, 43 Barb. 392; *Brown v. Leavitt*, 31 N. Y. 114. All of the above cite the principal case.

THE PRINCIPAL CASE IS CITED IN *Voorhis v. Voorhis*, 50 Barb. 125, as an authority showing that the findings or conclusions of referees are generally, and ought, if possible, to be sustained, if they cover the case, and are decided on correct principles of law.

ROUSE v. WHITED.

[25 NEW YORK, 170.]

WHERE PART OF CONVERSATION HAS BEEN GIVEN IN EVIDENCE, any other or further part thereof may be admitted in reply which would in any way explain or qualify the part first given. Thus, where the plaintiff, to show that his property had been applied to the defendant's use, in payment of a note made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff and declared that it was plaintiff's, it was held that the defendant was entitled to prove his statement in the same conversation that the note was the plaintiff's debt, and he was to pay it.

ACTION for money paid to defendant's use. The opinion sufficiently states the facts.

A. Pond, for the appellants.

J. A. Shoudy, for the respondents.

By Court, SUTHERLAND, J. The only important question presented by this appeal is: Had the defendants a right to prove on the cross-examination that when Oliver Whited told the sheriff, and both defendants told Seaman, that the property levied on was the plaintiff's, they at the same time and as part of the same conversation said that the debt (the execution debt) was the plaintiff's debt, or belonged to him to pay? It appears that the county court reversed the judgment of the justice solely on the ground that the defendants had a right to prove such further statements, and that the supreme court reversed the judgment of the county court and affirmed that of the justice, solely on the ground that they had not a right to prove such further statements.

It is plain that there must be some limitation of the right of the party whose statement or admission, forming a part of a conversation, has been given in evidence against him to prove further or other statements or declarations made by him at the same time or as part of the same conversation, otherwise

the court and the jury might be compelled to listen to a long story about matters not at all connected with any matter or thing in controversy between the parties. No one will say that a party whose statement has been given in evidence against him by his opponent, has a right to prove all that he said at the time or in the same conversation, solely because such further or other statements were made at the same time or in the same conversation.

The question then is, What is the rule of the limitation of this right? In *Queen's Case*, 2 Brod. & B. 297, 298, Abbott, C. J., in delivering the opinion of the court on certain questions proposed by the lords to the judges, said: "The conversations of a party to the suit are, in themselves, evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation, and not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit, because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on this occasion."

The rule as thus stated was certainly very broad. The only limitation upon the right of the party to give the whole conversation in evidence by the rule, as thus stated, would seem to be that the other or further part or parts of the conversation offered in evidence, to be admissible, must relate to the subject-matter of the action. By the rule, as thus stated, if the defendant is sued as the maker of two several promissory notes, to one of which his defense is that he never made it, and to the other that he had paid it, and the plaintiff proves on the trial that at a certain time the defendant said or admitted that the note which he had denied making was his note, or that he had made and delivered it, the defendant has a right to prove that at the same time, or as part of the same conversation, he also said that he had paid the other note. So, also, by the rule as thus stated, if the plaintiff has but one cause of action, and cannot recover without establishing affirmatively two distinct issuable facts, if for the purpose of establishing one of them he gives evidence of a statement or admission of the defendant

relative to it, the defendant has a right to give evidence of what he said at the same time or in the same conversation relative to the other. As, for instance, take the case put by Judge Cowen, in *Garey v. Nicholson*, 24 Wend. 351. The defendant is sued as indorser; he denies that he indorsed the note, and he also denies that he received due notice of its dishonor. The plaintiff proves his admission that he received due notice of dishonor. By the rule as stated by Abbott, C. J., in *Queen's Case*, 2 Brod. & B. 297, the defendant has a right to show that when he made the admission he also said that the indorsement was a forgery.

The rule, as stated by Abbott, C. J., was adopted by Mr. Starkie, and laid down in his work on evidence: 1 Stark. Ev., 2d ed., 180. I think Mr. Greenleaf intended to lay down substantially the same rule: 1 Greenl. Ev., secs. 201, 218. In section 218, *Queen's Case*, 2 Brod. & B. 297, is cited.

In *Prince v. Samo*, 7 Ad. & E. 627, Lord Denman, C. J., who delivered the opinion of the court, referred to the broad language of the rule, as laid down in Starkie's Evidence, on the authority of Abbott, C. J., in *Queen's Case*, 2 Brod. & B. 297, and denied that he had the countenance of authority for the extent to which it went. He denied that any rule letting in the whole conversation of a party merely because it relates to the subject-matter of the action, had the countenance of authority. He stated the rule to be, that where part of a conversation had been given in evidence, any other or further part of the conversation might be given in evidence in reply, which would in any way explain or qualify the part first given in evidence.

In the tenth English edition of Phillips' Evidence, after a review of the authorities, and a particular reference to the decision in *Prince v. Samo*, 7 Ad. & E. 627, the rule is laid down as follows:—

“Where a statement forming part of a conversation is given in evidence, whatever was said by the same person in the same conversation that would in any way qualify or explain that statement, is also admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible; and there is no difference in this respect between statements made in conversation by a party to the suit and those made by a third party”: 1 Phill. Ev., 4th Am. ed. from 10th Eng. ed., 416.

This is substantially the rule stated in *Prince v. Samo*, 7 Ad.

& E. 627. This rule, so far as it applies to the conversation or statements of a party to the suit, was approved by the supreme court of this state in *Garey v. Nicholson*, 24 Wend. 850, Justice Cowen delivering the opinion. That case called for no expression of opinion as to that part of the rule applying to the conversation or statements of a third party. In *Forrest v. Forrest*, 6 Duer, 102, the rule as stated in *Prince v. Samo*, 7 Ad. & E. 627, and approved in *Garey v. Nicholson*, 24 Wend. 850, was somewhat criticised, and held not to apply to documentary evidence. The rule was also approved in *Dorlon v. Douglass*, 6 Barb. 451, although there may be some doubt whether it was properly applied in this case. The rule was also recognized in *Sturge v. Buchanan*, 10 Ad. & E. 598.

All the cases in this state which I have looked at, where it has been held that the whole admission or statement of the party must be taken together, are within the rule as stated in *Prince v. Samo*, 7 Ad. & E. 627; *Carver v. Tracy*, 3 Johns. 427; *Wailing v. Toll*, 9 Id. 141; *Credit v. Brown*, 10 Id. 365; *Smith v. Jones*, 15 Id. 229; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Kelsey v. Bush*, 2 Hill, 440; *Vibbard v. Staats*, 3 Id. 144. These cases merely decide that when the plaintiff avails himself of a statement or admission of the defendant to charge him, the defendant may avail himself of any other statement made by him at the same time, tending to destroy or modify the use which the plaintiff might otherwise make of the admission or statement first called out by him. And certainly, to destroy or modify the effect or the use which can be made of an admission or statement is to qualify it.

In *Forrest v. Forrest*, 6 Duer, 126, 127, the superior court say: "The cases in this state falling under our observation, and involving the question whether, when part of one party's conversation has been proved by the other, the former may have the whole of it proved, are cases in which the additional conversation either justified the act, or showed payment, or a release of the demand, or a counterclaim growing out of the original transaction forming the subject of the action, which the parts of the conversation first proved tended to establish."

Assuming this to be so, the additional conversation was admissible by the rule stated in *Prince v. Samo*, 7 Ad. & E. 627. But the superior court add: "It is difficult to perceive why proof by a party's admission that he had bought specific property may be met by proof that he stated at the same time that he paid for it, and yet, that where a plaintiff, claiming to

have two distinct demands against a defendant, proves a declaration of the defendant admitting one of them, the defendant may not be allowed to prove that he, in the same conversation, and in the same breath, said he had paid the other."

Now, I cannot perceive the least reason why the defendant in the case put should be allowed to prove that he had paid the other note. The action is against the defendant, as the maker of two notes; to the one, the defense is that it is a forgery; and to the other, payment. Can any reason be given why, if the plaintiff proves that the defendant said he signed the note he alleges to have been forged, the defendant should be permitted to prove that he said, at the same time, that the other note was paid? I do not see why he would not have as much right to prove that he said that a note not included in the action was paid. The plaintiff has a right to avail himself of the admission of the defendant that he signed the one note; why should he not be permitted to do so, without giving the defendant a right to prove his voluntary statement as to the other note? The statement that the other note was paid has no connection with and in no way tends to explain the other statement, or to qualify the use or effect of it against him in the action. So, also, where there is but one cause of action, but the plaintiff has to prove affirmatively two distinct issuable facts, as in action against an indorser,—the indorsement and due notice of dishonor. If the plaintiff avails himself of the defendant's admission to prove due notice of dishonor, why should the defendant be permitted to show that he, at the same time, said he never indorsed the note? The admission as to the notice does not tend to prove the indorsement. All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of equity require that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use should be shown and considered in connection with it.

The rule is stated in *Prince v. Samo*, 7 Ad. & E. 627, with reference to the use which the party calling out an admission or statement of his adversary can make of it in the action, and irrespective of the number of causes of action, or of issues, if there is but one cause of action.

I think the rule stated in *Prince v. Samo*, 7 Ad. & E. 627, at least so far as it applies to the conversation of a party to

the suit, is the reasonable and correct rule, and is the rule which has generally been recognized in this state.

The question then in this case is, whether the justice, under the rule as limited in *Prince v. Samo*, 7 Ad. & E. 627, should have permitted the defendants to show that when the defendant Oliver Whited told the sheriff, and both the defendants told Seaman, that the property levied on was the plaintiff's, they at the same time made the further statement that the debt was the plaintiff's, or was his debt to pay. Most clearly he should. The plaintiff relied on the statements of the defendants proved by him, to show that the property levied on was his property, and thus to show that his property, to the amount of twenty-seven dollars, had gone to pay the defendant's debt. If the property was his, but it had been levied on and sold to pay his own debt, there was an end of his case. The statements, then, of the defendants, that the debt was the plaintiff's, or belonged to him to pay, if proved, would have completely destroyed the force and effect and intended use of the admissions or statements first given in evidence by the plaintiff, and ought to have prevented a recovery. It is difficult to suppose a case more clearly within the limitation of the rule as laid down in *Prince v. Samo*, 7 Ad. & E. 627. Certainly one statement which completely destroys the force and effect and intended use of another statement, qualifies the latter statement.

Although the plaintiff was the indorser and the defendants the makers of the note on which the judgment was obtained, it may very well have been that the note was made for the accommodation of the plaintiff, and that the debt was his debt to pay. If this was the fact, the defendants had a right to show it: *Barry v. Ransom*, 2 N. Y. 462; *Griffiths v. Reed*, 21 Wend. 502 [34 Am. Dec. 267].

The other questions in the case were, I think, rightly decided by the supreme court.

The judgment of the supreme court should be reversed, and that of the county court affirmed, with costs.

DAVIES, WRIGHT, GOULD, ALLEN, and SMITH, JJ., concurred.

Ordered accordingly.

ADMISSION IN EVIDENCE OF PART OF CONVERSATION OR TRANSACTION, AND ITS EFFECT TO AUTHORIZE ADMISSION OF REMAINDER THEREOF.—The rule laid down in the leading case of *Prince v. Samo*, 7 Ad. & E. 627, is that "where a statement forming part of a conversation is given in evidence, whatever was said by the same person in the same conversation that would

in any way qualify or explain that statement, is also admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible; and there is no difference in this respect between statements made in conversation by a party to the suit and those made by a third party." The difference between the ruling in this case and that in *Queen's Case*, 2 Brod. & B. 297 (which related solely to the conversations of parties to the suits), was that in the latter case any of the remainder of the conversation was admissible, "provided only that it related to the subject-matter of the suit"; while in the former, only such portion of the conversation was held admissible as qualified or explained what had been drawn out concerning the conversation by the other party. The court in *Prince v. Somo*, *supra*, expressly qualified *Queen's Case*, *supra*, and the rule laid down at that time has been generally followed in the courts since: 1 Greenl. Ev., sec. 467; Taylor on Evidence, 7th ed., sec. 733; *Nelson v. Iveson*, 24 Ala. 9; *Jones v. Fort*, 36 Id. 449; *Doonan v. Mitchell*, 26 Ga. 472; *Metzer v. State*, 39 Ind. 597, citing the principal case; *Gaddis v. Lord*, 10 Iowa, 141; *McIntyre v. Harris*, 41 Min. 81; *Mullins v. Cottrell*, Id. 291; *Commonwealth v. Keyes*, 11 Gray, 323; *Carver v. Tracy*, 3 Johns. 427; *Walling v. Toll*, 9 Id. 141; *McClure v. Maynard*, 35 How. Pr. 313; *Root v. Brown*, 4 Hun, 797; *People v. Cox*, 21 Id. 50; *Starts v. People*, 45 N. Y. 340; *Sturm v. Williams*, 6 Jones & S. 347; *Misselbeck v. Gretna*, 6 Thomp. & C. 660; *Platner v. Platner*, 78 N. Y. 103; *Grattan v. Metropolitan L. I. Co.*, 92 Id. 274; *Robeson v. Schuykill Nwa. Co.*, 3 Grant Cas. 186; *Bank v. Donaldson*, 6 Pa. St. 179; *Haisten v. Hizen*, 3 Sneed, 691. In *Garey v. Nicholson*, 24 Wend. 350, the rule was approved only so far as it applied to declarations of parties to the action. In a few cases the rule in *Queen's Case*, *supra*, has been followed: *Clark v. Smith*, 10 Conn. 1; *Thrall v. Smiley*, 9 Cal. 529; *Dorlon v. Douglass*, 6 Barb. 451. The rule has been extended, as will be seen, beyond mere conversations to admissions in writing, such as letters, pleading, records, and the like. That is deemed to qualify admissions which rebuts or destroys the inference to be drawn from or affects the use to be made of them: *Grattan v. Metropolitan L. I. Co.*, 92 N. Y. 274.

The whole or additional evidence cannot be introduced after part evidence of admissions, unless the latter makes it necessary that the other be introduced by way of explanation: *Collins v. Johnson*, Hemp. 279; but the fact that evidence of the admissions, in the first place, was immaterial, will not cut off the other party from cross-examination concerning the remainder of the conversations or admissions: *Ketchingham v. State*, 6 Wis. 426; *Lanier v. British Bank*, 18 Ala. 625; *Cabiness v. Martin*, 4 Dev. L. 106. Where the conversation was not gone into save in a negative way to show that a certain thing was not spoken of, the rest of the conversation was held inadmissible: *Platner v. Platner*, 78 N. Y. 103.

Where one puts in evidence the admissions of a party against himself, it is no objection to allowing in evidence the rest of what was said at the same time on the same subject, that the latter is favorable to the party offering it, though the party's declarations otherwise would not be admissible in his own favor: *Chambers v. State*, 26 Ala. 59; *Hudson v. Howlett*, 32 Id. 478; *Adkins v. Hershey*, 14 Ark. 442; *Moore v. Wright*, 90 Ill. 470; *State v. Martin*, 28 Mo. 531; *Garey v. Nicholson*, 24 Wend. 350; *Crosby v. Leary*, 6 Bosw. 312; *Goodyear v. De la Vergne*, 10 Hun, 537; *Beares v. Copley*, 10 N. Y. 93. But the rule that when part of a conversation is introduced, the other party is entitled to the whole of it, does not apply to a case where a party seeks to introduce his own statements, in his own favor, made at a conversation

with his own witness, to whose testimony the other party did not object: *State v. Elliott*, 15 Iowa, 72. Thus a party who has put in evidence the statement of a witness to himself, cannot put in his answer to such statement, although the other side cross-examined the witness as to the statement: *Ouel v. State*, 24 N. J. L. 843. So the rule as to conversations does not apply to conversations subsequent to the admission, and having no connection with the subject-matter thereof: *Robinson v. Ferry*, 11 Conn. 460; *Straw v. Greene*, 14 Allen, 206. Nor will it admit other conversations not referred to in the one put in evidence: *Parker v. Barker*, 16 N. H. 333.

To contradict a witness, his testimony on another occasion was introduced in part, and it was held that all of such testimony relating to the same subject-matter was admissible, but not such parts as referred to a totally different matter from that under consideration: *Wilhelm v. Cornell*, 3 Grant Cas. 178. Where a party asks a witness whether he made certain statements, and he admits that he did, the other party may nevertheless, after proof of such statements, show other parts of the same conversation: *Root v. Brown*, 4 Hun, 797; *Clark v. Fletcher*, 1 Allen, 53. Where a witness is questioned concerning a certain material conversation, and he states the whole of it up to a certain point, when he says he left the place where it was going on, it is held that the remainder on the same subject, carried on after the witness left, is admissible as part of the same conversation: *Frank v. State*, 27 Ala. 37; *Barbour v. Martin*, 62 Me. 536.

A conversation between parties as to certain terms to be inserted in a written contract, is admissible in evidence when the opposite party has drawn out part of the conversation: *Oakland Ice Co. v. Macey*, 74 Me. 294. Where on a trial for selling intoxicating liquors a witness testifies that his companion told him that the seller was the defendant, it was held that this did not entitle the other party to ask witness what else was said, and why he was at the place where the liquor was sold: *Commonwealth v. Keyes*, 11 Gray, 323. If a witness testifies that he accused the defendant in a criminal trial of the crime, the latter's answer at the time is held admissible in his own favor: *State v. Patterson*, 63 N. C. 520; *Sager v. State*, 11 Tex. App. 110. Declarations of ill-will against a prisoner are not qualified or explained by the relation of facts and confessions tending to prove the prisoner's guilt, and the latter are not admissible, under the rule, as part of the same conversation: *Hard v. Gill*, 45 N. Y. 340. Where a witness was asked if, in the course of a certain conversation, he made declarations of ill-will against the prisoner, and he denied making any such declarations, it was held that the rest of the conversation concerning what was said would not be admissible: *Greer v. State*, 6 Baxt. 629.

The whole of a receipt is always in proof, and one part cannot be separated from the rest in a judicial interpretation of it: *Butler v. Steamboat Arrow*, 1 Newb. 59. Plaintiff having proved that defendant said he would see about a certain claim, the defendant may show that he said at the same time that he had a receipt in full: *Scruggs v. Bibb*, 33 Ala. 431. If part of a conversation going to remove the bar of the statute of limitations is admitted, the rest of it amounting to a denial of the indebtedness must also be admitted: *Haydon v. Stewart*, 17 Md. 105. Part of a conversation in which a defendant had spoken concerning his liability as a guarantor, being admitted at plaintiff's instance, defendant may introduce the balance of the conversation showing his denial of his liability: *Stevenson v. Hoy*, 43 Pa. St. 191. Evidence of a conversation, in which a husband admitted his liability for a debt incurred by his wife, being introduced, the remainder of what was said is

held admissible to show that the plaintiff in such conversation misrepresented the nature of his claim, and misled the defendant to make the promise: *Brown v. Mudgett*, 30 Vt. 68. Where parol evidence was admitted to show what a party testified to on a former occasion, it was held that the same kind of evidence was admissible on behalf of the other party to prove contradictory statements of the witness on such former occasion: *Tyrrel v. Woodbridge*, 27 N. J. L. 416.

Where part of a letter has been read, other explanatory parts are admissible: *Walker v. Griggs*, 28 Ga. 552. Where a letter is read to charge a party, his answer is held to be admissible in reply, under the rule which admits the whole of a conversation or transaction: *Roe v. Day*, 7 Car. & P. 705; *Gibson v. Lacy*, 87 Ind. 202; *Lester v. Sutton*, 7 Mich. 329; *Livermore v. St. John*, 4 Rob. (N. Y.) 12. So, where the reply to a letter is introduced, it is held that the other party may explain such answer by introducing the letter to which it was a reply: *Watson v. Moore*, 1 Car. & K. 626. Where a letter referred to a memorandum, and one party read the letter, to charge the other, it was held that the other might explain the letter by introducing the memorandum in evidence: *Barney v. Smith*, 4 Har. & J. 485. Because one letter of a series, as in a letter copying-book, is admitted, this is not ground for admitting the whole series or book of letters: *Sturge v. Buchanan*, 2 Macl. & R. 90. But where a defendant makes evidence of a number of a series of plaintiff's letters to charge him, this makes the whole series evidence for the plaintiff: *Zimmerman v. Huber*, 29 Ala. 379; *Raymond v. Howland*, 17 Wend. 389.

Where a firm book is used by a partner merely for the purpose of fixing a date, the entries of accounts in the book are not therefore admissible in evidence: *Abbott v. Pearson*, 130 Mass. 191. But if a party wishes to avail himself of credits in a book of accounts, he cannot alone introduce the entries of such credits; the whole book becomes evidence: *Veiths v. Hagge*, 8 Iowa, 163; *Piper v. White*, 56 Pa. St. 90. It is held that a party cannot read distinct and disconnected paragraphs in a newspaper because one has been read by his adversary: *Darby v. Ouseley*, 1 Hurl. & N. 1. If part of an affidavit or deposition is read in evidence, the remainder relative to the same matter may be read: *Forrest v. Forrest*, 6 Duer, 102; *Webster v. Calder*, 55 Ma. 165; *Lynde v. McGregor*, 13 Allen, 172; but this does not necessitate nor does it authorize the whole to be read: *Houstine v. O'Donnell*, 5 Hun, 474, citing the principal case. Where part of a record is offered in evidence by one party, it is held that the other may read the rest of it in evidence: *Baker v. Mygatt*, 14 Id. 131; *Halle v. Hill*, 13 Mo. 612; *Davis v. Forrest*, 2 Cranch C. C. 23; *State v. Hawkins*, 81 Ind. 486. So if part of a pleading is read or adopted to charge a party, he may offer the rest of it in explanation; for admissions in a pleading must be accepted as an entirety: *Pennell v. Meyer*, 2 Macl. & R. 98; *Bumpass v. Webb*, 1 Stew. 19; *Davies v. Flavellen*, 29 Ga. 49; *Gildersleeve v. Maloney*, 5 Duer, 283; *Goodyear v. De la Vergne*, 10 Hun, 537; but a party cannot use the rest of his pleading as affirmative evidence for himself: *Cann v. Todd*, 21 Mo. 303.

LOWERY v. STEWARD.

[25 NEW YORK, 232.]

DRAFT BY CONSIGNOR ON HIS CONSIGNEE FOR SUM PAYABLE TO THIRD PERSON out of proceeds of goods when the same should be sold, is a specific appropriation to the use of the latter, and binds the consignee to retain so much of the proceeds as is necessary to meet the draft; and the obligation of the consignee to the payee is not discharged by failure of the payee to present the draft for payment for several months, and an agreement in the mean time between the consignor and consignee for a new appropriation of the fund for the benefit of the latter.

ACTION against defendants for the amount of a draft against them held by plaintiffs. It appeared from the evidence that Strippleman and Boyce, a firm of Columbus, Texas, consigned cotton to defendants, Steward & Co., of New York, forwarding at the time the bill of lading, and notifying them that they had drawn on them, in favor of Lowery & Co., for five hundred dollars, payable when the cotton should be sold. Strippleman and Boyce also wrote to plaintiffs (Lowery & Co.), notifying them that such draft was forwarded inclosed with the letter; but it seems the former firm failed to inclose the draft. Lowery & Co., nevertheless, took the letter to Steward & Co., and stated the facts, whereupon they were informed that it was all right, that the draft would be paid out of the proceeds of the cotton when sold. The draft came to hand several months later, when plaintiff presented it for payment, but defendants refused to pay because in the mean time they had appropriated the proceeds of the cotton to the payment of their account against Strippleman and Boyce, in pursuance of directions from the latter firm. Judgment for plaintiffs. Defendants appealed.

Waldo Hutchings, for the appellants.

John Sessions, for the respondents.

By Court, **SMITH, J.** The letter of Strippleman and Boyce to the defendants, dated March 1, 1853, accompanying and inclosing a bill of lading of the twenty-four bales of cotton, expressly advised them that they (Strippleman and Boyce) had written to Messrs. Archibald H. Lowery & Co., 121 Front Street, New York, inclosing a draft on their (defendants') house for five hundred dollars, payable when the said cotton was sold. This was a clear and explicit appropriation of five hundred dollars of the proceeds of said cotton, when sold, to the use of A. H. Lowery & Co., payable upon the presentation

of the said draft. The defendants obviously so regarded it at the time, for in their letter of the date of March 28th, acknowledging the receipt of the bill of lading, they say: "Your draft in favor of A. H. Lowery & Co. shall be honored from the proceeds of the cotton," etc.; and the statement of the defendants, by their clerk, in the presence of one of the defendants, that "it was all right, and that the draft would be paid out of the proceeds of the cotton," is to the same effect. The draft was not a bill of exchange, requiring acceptance to bind the drawers, but a specific draft or order upon a particular fund: Story on Bills of Exchange, 86. It was equivalent to an assignment in equity to Lowery & Co. of so much of the proceeds of the cotton: *Morton v. Naylor*, 1 Hill, 584. So far as the defendants are concerned in the sale of this cotton, they were bound to keep five hundred dollars of the proceeds to meet this draft. What their rights and liabilities would have been if the draft had not been presented to them for payment, it is unnecessary to consider, for the draft was, in fact, presented for payment before they had parted with the funds. It may be that the plaintiff could not have maintained an action for the money without the production of the draft, or proof of its delivery and loss. The promise of the defendants to them, and to Strippleman and Boyce, was, not to pay Lowery & Co. the money, but to pay the draft from the proceeds of the cotton. The money received from the sale of the cotton, to the extent of five hundred dollars, they were bound, I think, to keep, as upon special deposit in their hands, for the benefit of the plaintiff, to meet this draft. It was equitably their property, and was to be held for them till called for by the production of the draft: *Berly v. Taylor*, 5 Hill, 577. No question could be made in respect to the correctness of this view of the draft, if it had, in fact, been inclosed in the letter of Strippleman and Boyce to Lowery & Co., of the date of March 1, 1853. The case does not contain the special findings of fact, as required by section 267 of the code, and we must therefore, if need be, presume such facts found by the referee as will sustain the judgment: *Grant v. Morse*, 22 N. Y. 823; *Carman v. Pultz*, 21 Id. 547. But if it was necessary so to find, I am inclined to think the referee might have found upon the evidence that the draft was delivered to Lowery & Co. at the date of the letter of Strippleman and Boyce to them (March 28, 1853). Such was their clear intention, which equity would effectuate to protect the title of Lowery & Co., if necessary,

certainly as against the defendants, who had full and distinct notice of such equity. They could not be allowed to appropriate the fund to their use, or to any other use, after such notice, and their positive agreement to hold the funds for Lowery & Co., certainly not to the payment of their own precedent debt against Strippleman and Boyce.

The proceeds of this cotton, it appears from the account rendered by the defendants, was \$825.28. Deducting from this sum the draft of the consignees of August 8, 1853, for \$353.04, accepted by the defendants, and they had \$472.24 applicable to the payment of the plaintiff's draft, and which upon no pretense, as shown in the case, could the defendants retain or refuse to apply upon plaintiff's draft. But I think they are liable for the payment of the whole draft, upon the ground above stated, that of the proceeds of the said twenty-four bales of cotton, five hundred dollars were, at the time of its receipt by the consignees, distinctly, in legal effect, set apart and appropriated for the use and benefit of the plaintiff, and that as soon as the money came to their hands from the sale of the said cotton, it was money had and received by them on special deposit, for the use and benefit of the plaintiff, which they could not use, or appropriate, or apply to any other purpose. They were bound to keep it to meet this draft, which they were informed had been drawn upon it, in favor of the plaintiff. If instead of sending cotton to the defendants for sale, part of the proceeds to be paid to the plaintiff, Strippleman and Boyce had sent to them five hundred dollars, to be paid to plaintiff to be applied on their debt to him, on production of an order sent for that purpose, can it be doubted that the money would be received and held in trust for the plaintiff, at least in equity, and that he might affirm the trust and demand the money, if the draft did not come to hand or was lost? In this case, the money was to be applied upon the debt of Strippleman and Boyce to the plaintiff. In the letter to Lowery & Co., of March 1st, they said: "We inclose draft on J. Steward & Co., for five hundred dollars, which you will please credit on our note." Plaintiff then held their note for \$1,476.50, due February 6th previously. The appropriation of the fund was complete as soon as the cotton came to the defendants' hands. They were the trustees of the cotton and its proceeds for the plaintiff's benefit, to the amount of five hundred dollars. The draft or order was necessary only for a

voucher. They were not bound to accept the draft; acceptance was entirely unnecessary.

I think the judgment below should be affirmed.

DENIO, C. J., and DAVIES, SUTHERLAND, and GOULD, JJ., concurred.

Judgment affirmed.

EQUITABLE ASSIGNMENTS, OR ASSIGNMENTS OF DEMANDS TO BECOME DUE. See *Field v. Mayor of New York*, 57 Am. Dec. 435, and note 440; *Martin v. Maner*, 70 Id. 223, and note 226. An assignment of non-existing but definite expected funds, i. e., funds to be made, operates as an appropriation and transfer thereof, and is enforceable when the funds are made, where notice of the transfer is given to the debtor: *Hall v. Buffalo*, 2 Abb. App. Dec. 307; S. C., 1 Keyes, 169; *Gallagher v. Nichols*, 16 Abb. Pr., N. S., 342; S. C., 60 N. Y. 447; *Ballou v. Boland*, 14 Hun, 359; *Parker v. Baxter*, 19 Id. 417; *Kelly v. Roberts*, 40 N. Y. 438; *Alger v. Scott*, 54 Id. 16; *Munger v. Shannon*, 61 Id. 257; *Brill v. Tuttle*, 81 Id. 461; *Duncan v. Berlin*, 5 Rob. 472; *Shuttleworth v. Bruce*, 7 Id. 161, all citing the principal case.

TOMPKINS v. DUDLEY.

[25 NEW YORK, 272.]

DESTRUCTION BY FIRE OF HOUSE WHICH WAS BEING BUILT UNDER CONTRACT will not relieve contractor from liability to an action for money advanced upon the contract, and damages for its non-performance, although at the time of the fire he had substantially performed his contract, if the house had not been completely finished and delivered.

ACTION for money advanced upon a contract, and for damages for its non-performance. The opinion states the facts.

Homer A. Nelson, for the appellants.

John K. Porter, for the respondents.

By Court, DAVIES, J. On the 31st of August, 1857, Cornelius Chambers, by a written contract, agreed to make, erect, build, and furnish for the plaintiffs a school-house, according to certain plans and specifications, and to furnish the materials, for the sum of \$678.50. The school-house was to be completed on the first day of October, 1857. The defendants guaranteed the performance of the contract on the part of the builder. The building was not completed on the first day of October, and it was burned down on the night of the 5th of October. The judge who tried the cause found, as matter of fact, that the contract was substantially performed by

Chambers, but that the building was not entirely completed, according to the specifications, there remaining to be done a small amount of painting, and the hanging of the window-blinds, and that the same had not been formally accepted nor the key delivered, on the 5th of October. This action is brought to recover the money paid on account to Chambers, as the building progressed, and for the damages which the plaintiffs have sustained by reason of the non-completion of the contract, the fulfillment of which was guaranteed by the defendants. It is undeniable that the school-house was not completed, nor delivered and accepted by the plaintiffs at the time of its destruction. They had a right to insist upon the completion of the contract, according to its terms, and the builder did not allege or pretend that he had completed it. A substantial compliance with the terms of the contract will not answer when the contractor, as in this case, admits and concedes that the work was incomplete; he was still in possession, engaged in its completion. According to the testimony, about sixty dollars was yet to be expended on the building. Had the builder completed the building, and complied with his contract, at the time of the destruction of the school-house? I am constrained to say he had not. He was not only to complete it in accordance with its terms, but was to deliver it over to the plaintiffs thus finished, or offer to deliver it, before his whole duty was performed. Now it is undeniable that the builder did not do this. A portion of the work was yet to be done; the builder was still in possession, and actually engaged in the work of completion at the time of its destruction. This court has declared the law in this state to be, that a contract for the building of a vessel, or other thing *in esse*, does not vest any property in the party for whom it is to be constructed, during the progress of the work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party. It is said all the authorities agree in this: *Andrews v. Durant*, 11 N. Y. 35 [62 Am. Dec. 55], and authorities there cited. And it was also held that the law is the same, though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly.

In *Mucklow v. Mangles*, 1 Taunt. 318, which arose out of a contract for building a barge, the whole price was paid in advance, the vessel was built, and the name of the person who contracted for it was painted on the stern, yet it was

held that the title remained in the builder. Lawrence, J., said: "No property vests till the thing is finished and delivered." In *Merritt v. Johnson*, 7 Johns. 473 [5 Am. Dec. 289], where a sloop was agreed to be built, and one third of the price was to be paid when one third of the work was done, two thirds when two thirds were done, and the balance when it was completed; and before it was finished it was sold on execution against the builder after more than one third had been done, and more than that proportion of the price had been paid,—the court held that the vessel was the property of the builder, and not of the person who engaged it to be constructed. The court says, in its opinion: "The sloop did not become his property [the person for whom it was built] until finished and delivered." The supreme court of Massachusetts, in *Adams v. Nichols*, 19 Pick. 275 [31 Am. Dec. 137], a case quite like the present, say: "It is not very material to consider whose property the house was before its destruction. The principal defendant had contracted to build and finish a house on the plaintiff's land. After the conflagration, he might have proceeded, under the contract, and if he had completed a house according to the terms of his agreement, the plaintiff would have been bound to perform his part of the stipulations. So if in any stage of its progress he had seen fit to remove any part of the materials and substitute others, the plaintiff could not complain. They must, therefore, be deemed to be at his risk. And if he had not intended to incur this risk, he should otherwise have stipulated in his agreement. Had the article to be made been a chattel, or a coach, or a vessel, it is extremely clear that the materials, in the first place, and the article itself in every stage of its manufacture from its inception to its completion, would have been at the risk of the builder. Now it is not easy to perceive how it can make any difference in the construction or operation of the contract that the thing manufactured was to be attached to the freehold."

The builder, in the present case, by his own contract, created a liability and incurred a duty, which the defendants guaranteed he should perform, and which he has not performed. In justification of such non-performance, he alleges the destruction of the building by fire and inevitable accident, without any fault on his part. The law is well settled that this is no legal justification for the non-performance of the contract. This subject was most carefully considered and elaborately

discussed in the case of *Harmony v. Bingham*, 12 N. Y. 99 [62 Am. Dec. 142], and it was then held by this court that when a party is prevented by the act of God from discharging a duty created by the law, he is excused; but when he engages unconditionally, by express contract, to do an act, performance is not excused by inevitable accident, or other unforeseen contingency not within his control. Edwards, J., says: "This rule has been uniformly followed, and that, too, even in cases in which its application has been considered by the court as attended with great hardships." Ruggles, J., said: "It is a well-settled rule of law that when a party, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events; and in such a case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by or within the control of the party." These principles have been applied by the supreme courts of Massachusetts, Connecticut, and New Jersey, in cases almost entirely analogous to the one now under consideration. In *Adams v. Nichols*, 19 Pick. 275 [81 Am. Dec. 137], the action was upon a bond executed by Nichols, one of the defendants, as principal, and by Selkirk, the other defendant, as surety, conditioned that Nichols should fully perform an agreement in writing, by which he contracted to erect a dwelling-house for the plaintiff, on the plaintiff's land. It was agreed that at the time of the execution of the bond and agreement, the plaintiff advanced to Nichols the sum of four hundred dollars, in pursuance of such agreement; that subsequently Nichols commenced building the house, and continued to work on it until the 23d of August, 1836 (the agreement having been made October 5, 1835), at which time it was raised, and principally covered, and materials prepared for finishing it; that on the night succeeding that day the house was, from some cause unknown to both parties, wholly destroyed by fire, and that Nichols did not offer to rebuild the house. The trial was had before Shaw, C. J., who ruled that the destruction of the house did not constitute a legal defense to the action, and a verdict was taken for the plaintiff, by consent, subject to the opinion of the court. Morton, J., in delivering the opinion of the court, says: "The defendants do not pretend that they have executed their contract to build a house for the plaintiff, but contend that the

facts disclosed furnish a legal excuse for not doing it. . . . In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there was any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts. . . . The original contract remaining in force, and there being no legal excuse for not executing it, the defendants are liable for the damage which the plaintiff sustained by the non-performance of it."

In the case of *School District No. 1 v. Dauchy*, 25 Conn. 530 [68 Am. Dec. 371], the defendant, on the seventh day of December, 1853, made a contract in writing with the plaintiff to build the school-house for the sum of \$2,469, and to complete the same by the first Monday of May, 1854; a part of the price to be paid by installments, as the work progressed. The defendant commenced the building of the same, and had nearly completed it, when, on the 27th of April, 1854, it was struck by lightning, and consumed by the fire communicated thereby. At this time he had received one thousand dollars of the price, having been entitled thereto, under the contract, by the progress of the work. Ellsworth, J., in delivering the opinion of the court, says: "The defendant did agree, absolutely and unqualifiedly, that the building should and would be completed and ready to be delivered to the plaintiffs, by the first Monday of May, at the furthest. This he has not done. The building has not been completed nor delivered, although it is true he nearly finished it, and it is found could and would have completed it, had it not been destroyed by lightning. In the contract he made no provision for any contingency or event whatever, and the question is, Can he now incorporate into his contract a provision for a contingency or a condition, or must he abide by his positive and absolute undertaking?" After an able discussion of the question, and a careful review and analysis of the cases bearing upon it, the learned judge came to the conclusion that the defense set up affords no justification for the non-performance of the contract, and that the plaintiffs were entitled to recover their damages by reason of a breach thereof.

The only additional case needful to refer to is that of *School Trustees of Trenton v. Bennett*, 27 N. J. L. 514. In that case, a person had contracted with the owner of a lot to build, erect, and complete a building thereon, and by reason of a latent

defect in the soil, the building fell down before it was completed, and the supreme court of New Jersey held that the loss fell upon the contractor, and that when the contract was, by its terms, to build and complete a building, and find materials for a certain entire price, payable in installments as the work progresses, the contract is entire, and if the building, either by fault of the builder or by inevitable accident, is destroyed before completion, the owner may recover back the installments he has paid.

The court, in its opinion, says: "No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." And in reference to the argument of hardship, the court very justly says: "No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. The party that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. When one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it; the law will not insert for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do."

I arrive at the conclusion that the law is well settled that the defense interposed by the defendants constitutes no justification to Chambers, the builder, for the non-performance of his contract with the plaintiffs, and that, having guaranteed for an adequate consideration expressed therein,—its performance,—they are liable to respond to the plaintiffs for the damages which they have sustained by reason of such non-performance. If these views are concurred in by my brethren, the judgment appealed from must be reversed, and a new trial should be had, with costs to abide the event.

WRIGHT, GOULD, ALLEN, and SMITH, JJ., concurred.

Judgment reversed, and new trial ordered.

PARTY BY EXPRESS CONTRACT ENGAGING TO DO ACT IS NOT BELIEVED, by subsequent casualty or inevitable accident, from performance, or from making the other party good if performance becomes impossible: See *Harmony v. Bingham*, 62 Am. Dec. 142, and note 151. Title to building or manufactured article, when passes so as to relieve the contractor: See *Andrews v. Durant*, 62 Id. 52, and extensive note thereto 65-68. No default in performance of an entire contract from whatever cause, except act of God, will excuse the contractor from full performance, or entitle him to recover for part performance as on *quantum meruit*: *Jenkins v. Wheeler*, 2 Abb. App. 444; S. C., 37 How. Pr. 471; and 2 Keyes, 656; *Niblo v. Binsess*, 3 Abb. App. 379; S. C., 44 Barb. 60; and 1 Keyes, 479; *Chase v. Hogan*, 3 Abb. Pr., N. S. 65; S. C., 4 Rob. 96; *Smith v. McCluskey*, 45 Barb. 615; *Clinton v. Hope Ins. Co.*, 51 Id. 655; *Schukraft v. Euck*, 6 Daly, 3; *Sherwood v. Agricultural Ins. Co.*, 10 Hun, 585; *Wheeler v. Connecticut M. L. I. Co.*, 16 Id. 322; and accidental fire is not act of God in this regard: *Dexter v. Norton*, 55 Barb. 287; *McNeal v. Clement*, 2 Thomp. & C. 368. The reason for this rule is said to be that the parties, if they wished, might, by the contract, have provided against such contingencies: *Dexter v. Norton*, 47 N. Y. 64; S. C., 3 Thomp. & C. 371; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 492; *Delaware L. & W. R. R. Co. v. Burns*, 4 Jones & S. 139. All of the above cite the principal case.

GILLESPIE v. TORRANCE.

[26 NEW YORK, 306.]

RETRACTION OF WARRANTY OF QUALITY OF CHATTELS cannot be set up by way of defense, recoupment, or counterclaim, by the accommodation indorser of a note given for the price of the chattels in an action against him thereon.

CLAIM FOR DAMAGES FOR RETRACTION OF WARRANTY IN SALE does not rest upon a failure of the consideration of the contract on which the action is founded, but is a distinct claim which may be set up by way of defense or counterclaim, in the action for the price, or by a separate action, the election to do which rests in a principal, and cannot be made by a surety; though, it seems, a surety would be relieved in equity in case of insolvency of his principal.

ACTION upon a promissory note. The opinion states the facts.

Charles A. Rapallo, for the appellant.

William Stanley, for the respondents.

By Court, SELDEN, J. The defense in this case is not founded on a failure of the consideration of the note, otherwise than by a defect in the quality of the timber for which it was given. That being so, if there was neither warranty nor fraud in the sale of the timber, the defect in quality constitutes no defense: *Seixas v. Woods*, 2 Caines, 48 [2 Am. Dec. 215]; *Sweet v. Colgate*, 20 Johns. 196 [11 Am. Dec. 266];

Welsh v. Carter, 1 Wend. 185 [19 Am. Dec. 478]; *Johnson v. Titus*, 2 Hill, 606. The answer does not allege fraud in the transaction, and unless it shows a warranty of the quality of the timber, it presents no defense to the note, either partial or total. The argument of the appellant's counsel, to maintain the position that the defense rested upon a failure of consideration, and not upon a claim for damages on a breach of warranty, is very ingenious; but the answer and the proof show that all the timber contracted to be delivered to Van Pelt, and for which the notes were given, was in fact delivered, and the real ground of complaint is, that a much larger proportion of it than was shown by the inspector's certificates, upon the faith of which the purchase was made, proved to be of inferior quality. The law being well established that such defect of quality, in the absence of fraud or warranty, constitutes no defense to the note, or to any part of it, and there being no pretense of fraud, it follows that the defense, if there is any, rests upon a breach of warranty.

The question then arises, whether the plaintiff, an accommodation indorser upon a note given by Van Pelt to the plaintiffs for the timber, can avail himself of a breach of the contract of warranty in regard to the quality of the timber, made by the plaintiffs to Van Pelt, on the sale to him. To decide this question, it is necessary to ascertain the ground upon which such defenses, by way of recoupment, as they were denominated prior to the adoption of the code, now partially, if not wholly, merged in the much broader term "counterclaim," were admitted. If we regard such defenses as resting upon a failure of the consideration of the contract on which the plaintiff's action is founded, then unquestionably the defendant could avail himself of the breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defenses are regarded as the setting off of distinct causes of action, one against the other, then it is clear, as will be shown hereafter, that this defendant could not avail himself of such defense.

The subject of the precise ground on which a defendant is allowed to reduce a recovery against him, in an action upon a contract, by alleging and proving fraud or breach of warranty,—whether the contract, where there is fraud, is regarded as destroyed, and the recovery had on a *quantum*

meruit, or whether the reduction of the plaintiff's claim rests upon a partial failure of consideration, or upon the setting off of distinct claims against each other,—has often been discussed, but without any general concurrence of opinion on the question: *McAllister v. Reab*, 4 Wend. 90, et seq.; S. C. in error, 8 Id. 109; *Batterman v. Pierce*, 8 Hill, 171, 177; *Ives v. Van Epps*, 22 Wend. 155; *Nichols v. Dusenbury*, 2 N. Y. 286; *Van Epps v. Harrison*, 5 Hill, 66 [40 Am. Dec. 314]; *Barber v. Rose*, Id. 78; *Basten v. Butter*, 7 East, 479; *Withers v. Greene*, 9 How. 213.

A careful examination of the subject, I think, must lead to the conclusion that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them: *Ives v. Van Epps*, 22 Wend. 157; *Batterman v. Pierce*, 8 Hill, 171; *Britton v. Turner*, 6 N. H. 481 [26 Am. Dec. 713]; *Halsey v. Carter*, 1 Duer, 667; *Barber v. Rose*, 5 Hill, 81; *Stever v. Lamoure*, Hill & D., Lalor's Supp., 352, note a.

In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms; he has, however, arising from the fraud, a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by Bronson, J., in *Van Epps v. Harrison*, 5 Hill, 66 [40 Am. Dec. 314]: "When sued for the price, the vendee may, in general, recoup damages; but while he retains the property, he cannot treat the contract as wholly void, and refuse to pay anything. By retaining the property, he affirms the validity of the contract, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud." The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind, unless there is an express contract to that effect: *Street v. Blay*, 2 Barn. & Adol. 456; *Voorhees v. Earl*, 2 Hill, 288 [38 Am. Dec. 588]; *Cary v. Gru-*

man, 4 Id. 625 [40 Am. Dec. 299]; *Muller v. Eno*, 14 N. Y. 597; *Thornton v. Wynn*, 12 Wheat. 183; *Lattin v. Davis*, Hill & D., Lalor's Supp., 16. In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent, and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The "cross-claims arising out of the same transaction compensate one another, and the balance only is recovered": *Reab v. McAlister*, 8 Wend. 115; *Ives v. Van Epps*, 22 Id. 156; *Batterman v. Pierce*, 3 Hill, 174; *Nichols v. Dusenbury*, 2 N. Y. 287.

It has always been optional, as is suggested above, since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup, he could not, under the Revised Statutes, have a balance certified in his favor, nor could he maintain a subsequent action for such balance: *Sickels v. Pattison*, 14 Wend. 257 [28 Am. Dec. 527]; *Batterman v. Pierce*, 3 Hill, 171; *Wilder v. Case*, 16 Wend. 583; *Stever v. Lamoure*, Hill & D., Lalor's Supp., 352, note a; *Britton v. Turner*, 6 N. H. 481 [26 Am. Dec. 713].

Under the code of procedure, doubtless a balance might be recovered: Code, secs. 150-274; *Ogden v. Coddington*, 2 E. D. Smith, 317; but the right of election to set up a counterclaim in defense, or to bring a cross-action for it, still exists: *Halsey v. Carter*, 1 Duer, 667; *Welch v. Hazelton*, 14 How. Pr. 97. Now it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty: 1. Such damages constitute a counterclaim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him: Code, sec. 150; *Lemon v. Trull*, 18 How. Pr. 248; *Dows v. Congdon*, 16 Id. 576, note. 2. Van Pelt has a right of election whether the damages shall be claimed by way of recoupment in a suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counterclaim and have it allowed in this action, it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If

the right exists in this case, it would equally exist if the note was but one hundred dollars instead of eighteen hundred dollars. 4. Supposing the other notes given for the timber to have been indorsed by different persons for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?

In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great and possibly to a greater extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment; especially if the insolvency of the parties renders that course necessary for his protection: *Simson v. Hart*, 14 Johns. 63, 67; *Green v. Ferguson*, Id. 389; *James v. Morey*, 2 Cow. 261 [14 Am. Dec. 475]; *Lindsay v. Jackson*, 2 Paige, 581; *Chamberlin v. Stewart*, 6 Dana, 82; *Wathen v. Chamberlin*, 8 Id. 164; 2 Story's Eq. Jur., secs. 1446 a, 1437. My conclusion is, that the court below was right in holding that the defendant could not set up the breach of warranty in defense, partial or total, to the suit on the note; and as the warranty presented the only ground on which there could be a claim of defense under the answer, there is no necessity for considering the other questions presented in the case.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

DEFENDANT HAVING RIGHT TO SET UP COUNTERCLAIM OR SET-OFF in answer to the plaintiff's demand, has his election to do so or to bring a cross-action: *Collier v. Collins*, 17 Abb. Fr. 478; *Livermore v. Bainbridge*, 44 How. Fr. 361; *Krom v. Levy*, 47 Id. 106; S. C., 1 Hun, 176; and 3 Thomp. & C. 708; *Insles v. Hampton*, 8 Hun, 232; *Dunkan v. Bower*, 77 N. Y. 79; *Schwinger v. Raymond*, 83 Id. 196. If the defendant is a mere surety, having no interest in the contract, he cannot avail himself of any matter of defense which could form the subject of a separate action by his principal, since he could not bind that principal by his election to employ it as a defense: *Delano v. Rawson*, 10 Bosw. 292; *Putnam v. Schuyler*, 4 Hun, 170; S. C., 6 Thomp. & C. 487; *Morgan v. Smith*, 7 Hun, 246; *Henry v. Daly*, 17 Id. 212; *Emery v. Bala*, 22 Id. 487;

Lasher v. Williamson, 55 N. Y. 620; *O'Brien v. Karing*, 57 Id. 649; *Booth-staver v. Jayne*, 60 Id. 110; unless under circumstances appealing to the equitable consideration of the court: *Oss v. Cassidy*, 6 Daly, 243. Thus he cannot set up breach of the contract by way of recoupment: *Lewis v. McMullan*, 41 Barb. 432; *Nichols v. Townsend*, 7 Hun, 378. But it is held that he may set off the separate debt due to his principal by the creditor: *People v. Brandreth*, 3 Abb. Pr., N. S., 229; S. C., 34 How. Pr. 176; and 36 N. Y. 195. But although a surety might not avail himself of his principal's defense by recoupment, still if the principal elect to and successfully defends in such manner, it will inure to the benefit of the surety: *Springer v. Dwyer*, 50 Id. 22. All the above cite the principal case.

ON RECOUPMENT, DEFENDANT CANNOT RECOVER ANY EXCESS OF DAMAGES over plaintiff's claim, nor can he have an independent action for that excess: *McKnight v. Deslin*, 52 N. Y. 402. Breach of warranty is a defense which may be set up by way of recoupment or counterclaim: *Rosebrook v. Runnals*, 32 Wis. 421; and so likewise is a claim for other goods sold to the plaintiff: *Boston Mills v. Bull*, 6 Abb. Pr., N. S., 321; S. C., 37 How. Pr. 301; and 1 Sweeny, 363; or in an action for work and labor, damages for negligence in doing it: *Quackenbush v. Edgar*, 2 Jones & S. 335, all citing the principal case.

DEFECTS IN ARTICLE SOLD WILL NOT AVOID SALE, in absence of fraud or warranty: *McCormick v. Sarson*, 45 N. Y. 267; and after acceptance in such cases, the right to rescind is lost: *Parks v. Morris A. & T. Co.*, 54 Id. 59, both citing the principal case. The principal case is cited in *Leonard v. Fowler*, 44 Id. 297, as an authority explaining the law applicable to this topic.

LADUE v. GRIFFITH.

[36 NEW YORK, 364.]

COMMON CARRIER, WHO IS ALSO WAREHOUSEMAN, receiving freight to be forwarded, is presumed, in the absence of evidence to the contrary, to receive it in his capacity as carrier, and if while awaiting transportation he stores it in his warehouse, and it is barned without his fault, he is liable for its value.

ACTION for damages against defendants as common carriers for destruction of a parcel of leather intrusted to them for transportation, and destroyed by fire without their fault, while in their warehouse awaiting transportation.

Solomon G. Haven, for the appellants.

John L. Talcott, for the respondents.

By Court, SMITH, J. When the property in question was delivered on board the steamboat at Detroit, marked and consigned to Leander Warner, Leicester, Massachusetts, it was so delivered for transportation to that place.

It was known to the shipper, doubtless, that the steamboat Hudson could carry it no further than Buffalo; and it was

therefore consigned to the care of the defendants at that place, who were carriers upon the Erie Canal, to be carried or forwarded by them by canal, in the regular course of business, to Albany, and then to deliver the same at East Albany, at the railroad depot, to be further transported by the Western Railroad Company, via Clappville depot, to Leicester, Massachusetts. The direction upon the bill of lading, consigning the leather to the care of the defendants at Buffalo, made it the duty of the master of the steamboat to deliver it to them, and gave them the right to receive it from him; and thus secured to the defendants the profits incident to the transshipment, storage, and carriage of the property, until its transportation by canal was completed and the property delivered at the railroad depot at East Albany.

No right or duty in respect to such property was conferred by the owner upon any person, after its delivery on board the steamboat at Detroit, except that of carriage, and such as was incident to its transportation, until its delivery to the consignee at Leicester, Massachusetts. The proprietors of the steamboat Hudson received it as carriers, and so did the defendant, subject respectively to all the duties and responsibilities of common carriers.

These goods were placed by the defendants in their warehouse for their own convenience and for the purpose of being carried; and when goods are so stored, the carrier is responsible for their safe-keeping: Angell on Carriers, sec. 131, p. 180, and sec. 144; Story on Railroads, 536.

The owner of this property had no occasion to have the same placed in a warehouse at Buffalo for any purpose except such as pertained to its safe-keeping during its transportation. It was not intended to be stored in warehouses at Buffalo for any purpose. It might, doubtless, have been transferred immediately from the steamboat to some canal-boat at Buffalo; but if the defendants chose for any purpose to put it in their warehouse, it was to subserve their interests, and was at their own risk. The claim of the defendants to escape responsibility for the loss of these goods, upon the ground that they were simply warehousemen, and received them in that capacity, we think entirely untenable.

When a person is both carrier and warehouseman, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the pur-

pose of being carried further, the responsibility of the party having them in charge is that of a carrier: Angell on Carriers, sec. 133; and *Blossom v. Griffin*, 13 N. Y. 569, 572 [67 Am. Dec. 75]. But when goods are deposited in a warehouse subject to the further order of the owner, the case is otherwise. In such case, as Judge Buller said, in *Garside v. Proprietors of Trent and Mersey Navigation Company*, 4 Term Rep. 581: "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods. In such case, the rights and duties and responsibilities of warehousemen would attach to the person having the goods in store." But this rule cannot apply to any person having the charge or custody of the goods while they are *in transitu*. While the goods are in the process of transportation from the place of their receipt to the place of their destination, it will never do in this country, in my opinion, to subject them, in the hands of any carrier, or by his act or order, to the responsibilities of a mere warehouseman. The carrier at common law is an insurer of the goods as against all accidents and perils, except such as result from the act of God or a public enemy. A warehouseman is only responsible for ordinary care, and is merely responsible for loss or injury resulting from his own default or negligence. Millions of property in value in this country is in the constant possession of carriers engaged in transporting it from one place to another. In this particular, it may truly be said that men cast their bread upon the waters, expecting to see it again at a distant point after many days. Goods are shipped, and delivered to carriers by land, at the seaboard, or in the interior of the country, for transportation to distant points, with a simple direction indorsed of the name of the owner or consignee and the place of delivery. It would never do to hold that at any intermediate point such goods, at the option of a carrier, might be stored in a warehouse, and the carrier relieved thereby of his proper responsibility. If the defendants had owned the steamboat in which these goods were shipped at Detroit, no one would pretend, I think, that they could store them at Buffalo in a warehouse, at the risk of the owner, for their own convenience.

I conceive the responsibility of the defendants in respect to these goods, after they came in their possession, precisely the same, so far as related to their storage at Buffalo, as though they had been carriers for the whole distance from Detroit to Leicester, Massachusetts. Where there are several successive

carriers who are engaged in the transportation of goods from the place of their reception to the place of their destination, the liability of each carrier will commence with the reception of the goods, and will continue until they are delivered, according to the usage of the business, to the next carrier in the line of the transit: *Van Santvoord v. St. John*, 6 Hill, 158. When a carrier deposits property in his own warehouse at some intermediate place in the course of his own route, or at the end of the route where it is his duty to deliver it to the owner, his duty as carrier is not completed, and he will remain liable as carrier for any loss for which common carriers are ordinarily responsible: Story on Bailments, secs. 447, 536; *Forward v. Pittard*, 1 Term Rep. 27; *Hyde v. Trent Navigation Company*, 5 Id. 389. The defendants, I think, are responsible as carriers of the property in question upon the same principle. It was received and stored by them in their capacity or character as carriers as much as if they had received it at Detroit.

I think the judgment of the court below should be reversed, and a new trial granted, with costs, to abide the event.

DAVIES, WRIGHT, SELDEN, and SUTHERLAND, JJ., concurred.

DENIO, C. J., delivered a dissenting opinion.

GOULD and ALLEN, JJ., dissented.

Judgment reversed, and new trial ordered.

LIABILITY OF ONE WHO IS BOTH CARRIER AND WAREHOUSEMAN: See *Blossom v. Griffin*, 67 Am. Dec. 75, and note 82. Where a person acts both as warehouseman and carrier, and he receives goods which are to be carried further by himself and others, it is presumed that he received such goods in his capacity as carrier, and he is liable as such: *Northrup v. Syracuse etc. R. R. Co.*, 3 Abb. App. 390; S. C., 5 Abb. Pr., N. S., 430; *Coyle v. Western R. R.*, 47 Barb. 154; *Rogers v. Wheeler*, 6 Lana. 429; *Hooper v. Chicago & N. W. Ry Co.*, 27 Wis. 92; *Conkey v. Milwaukee & St. P. Ry Co.*, 31 Id. 631; *Hulet v. Swift*, 42 Barb. 250, all citing the principal case.

LIABILITY OF CONNECTING CARRIERS: See *Wells v. Thomas*, 72 Am. Dec. 230, note. The liability of such carriers is said to end with delivery to the next carrier: *Lamb v. Camden & A. R. R. Co.*, 2 Daly, 490; *Ransom v. Holland*, 5 Id. 156; S. C., 47 How. Pr. 302; *McDonald v. Western R. R. Corp.*, 34 N. Y. 503; *Fenner v. Buffalo & S. L. R. R. Co.*, 44 Id. 507, 512, all citing the principal case. In *Wood v. Milwaukee & St. P. R. R. Co.*, 27 Wis. 552, it is said that the principal case, if cited to establish the proposition that the liability of connecting carriers does not cease as such until delivery to the next carrier, does not establish that proposition, for in the principal case the goods were destroyed before transit commenced at all.

HAYES v. PEOPLE.

[25 NEW YORK, 393.]

MARRIAGE, TO SUPPORT INDICTMENT FOR BIGAMY, IS SUFFICIENT, if the parties agree to be husband and wife, and cohabit and recognize each other as such. And it is immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived by his false representation of that character.

ON INDICTMENT FOR BIGAMY, PROOF OF MANNER OF INTERCOURSE between defendant and his wife, subsequent to the contract of marriage, is admissible in corroboration of prosecutrix's testimony as to the actual marriage.

INDICTMENT for bigamy. The opinion states the facts.

James T. Brady, for the plaintiff in error.

S. B. Garvin, for the defendant in error.

By Court, **WRIGHT, J.** To convict of bigamy, a marriage in fact must be proved, and reputation and cohabitation alone are not sufficient. The fact of a marriage may be proved by a witness present at the celebration, and this is the ordinary way of proving it. In this state, marriage is a civil contract, and may exist without any formal solemnization by minister or magistrate.

The marriage of the prisoner to Sarah E. Blair in February, 1845, and that she was living at the time of the trial, was proved. To establish the fact of a second marriage in September, 1860, to Jane White, she was called and examined as the principal witness for the prosecution. She testified, in substance, that the prisoner made her acquaintance in May, 1860, and that in August following, and while she was at work as a servant in a hotel at Middletown Point, they entered into an engagement to be married in September. She was to come to New York for that purpose at the expiration of her month's service. On the 12th of September, the prisoner met her at the steamboat landing in the city, and conducted her to a house in Thompson Street, where he had taken rooms. That night she staid at her father's house in Brooklyn, and in the afternoon of the next day came over to the city and met the prisoner at the house in Thompson Street. They were together until about seven o'clock in the evening, when the prisoner went out and returned in a few minutes with a person represented to be a minister. He was dressed like one, and had on a white necktie. She did not ask his name. The marriage ceremony was then performed by this person. He used the form of marriage of the Protestant Episcopal Church. He

inquired of the witness if she would take the prisoner for her husband, and she replied in the affirmative; and the prisoner was asked if he would have her for his wife, and upon his replying affirmatively, the minister declared them man and wife. The person officiating gave her a certificate, using a partly printed form, and filling in the blanks by writing. The certificate was taken by the prisoner and put in his trunk, and was afterwards seen by a sister of the witness, when the parties were living together as man and wife. This marriage ceremony was followed by cohabitation, which continued for about a year. It was shown by other witnesses that the prisoner called her his wife, wrote letters to her as such, and admitted that he had been married to her in September, 1860.

If this evidence was to be credited, a marriage in fact, as contradistinguished from one inferable from circumstances, was proved. It is true that the authority, or official character, of the person performing the marriage ceremony was not affirmatively shown; and there was some proof in the case to excite, at least, a suspicion that the prisoner had procured the man who officiated to falsely represent himself as a clergyman. If, however, to constitute a valid marriage, it must be solemnized by a minister or magistrate, the evidence was sufficient, *prima facie*, to prove a marriage in fact. A person appearing in the character of a clergyman performed the ceremony, using the marriage service of the Protestant Episcopal Church. The marriage was followed by cohabitation, and the prisoner distinctly admitted to others that he was married at the time. If the person officiating was not a clergyman, it was for the prisoner to show that fact, after a *prima facie* case was made out against him: *State v. Rood*, 12 Vt. 396; *Rex v. Inhabitants of Brampton*, 10 East, 282. But the recorder was right in his charge to the jury. In this state, there may be a valid marriage, though not formally solemnized by a clergyman, or consent declared before a magistrate. If parties, competent to contract, in the presence of witnesses, agree together to be husband and wife, and afterwards cohabit and recognize each other as such, it is a sufficient marriage to sustain an indictment for bigamy, in the event of one of the parties having before that time married another, who is still living. It was not error, therefore, for the judge to instruct the jury that, if the prisoner and Jane White agreed, in the presence of the man represented to be a minister, to be man and wife, and afterwards lived together as such, that was, in

the eye of the law, a sufficient marriage to sustain an indictment for bigamy,—the fact that the prisoner had, before that time, married Sarah E. Blair, and she was then living, being admitted. And it was of no consequence whether the man represented to be a minister was such, or not. It is only claimed that the latter branch of the charge is erroneous; but marriage in this state, being a civil contract and not requiring the intervention of minister or magistrate to make it legal, this part of the charge was manifestly correct.

The judgment of the supreme court, and court of general sessions, should be affirmed.

ALLEN, J. There was no error in permitting the prosecution to inquire of the prosecutrix as to the place and manner of her living immediately after her alleged marriage to the prisoner. It was, although not a part of the *res gestæ*, nevertheless competent, so far as it tended to show cohabitation between the prisoner and herself, and that they lived together as married people. Such intercourse and mode of life was a legitimate corroboration of the statement of the witness as to the actual marriage, and one to the benefit of which the prosecution as well as the witness was entitled. Confessions and cohabitation would be competent evidence alone of a marriage in most civil actions. It is competent as evidence in all, but not sufficient in prosecutions for bigamy, actions for criminal conversation, and other cases, in which a marriage in fact must be proved. But in this, as in every other case, express evidence of a marriage in fact may be strengthened and supported by that which tends to prove the same fact, or from which in other actions and proceedings the existence of the fact might be presumed. The court properly allowed proof from the prosecutrix of the manner in which the parties lived, as regarded each other, for the few weeks immediately succeeding the imputed marriage. The evidence was clearly competent as tending to prove a marriage in fact resulting from a contract *per verba de futuro*, followed by cohabitation, which would have been allowable: Reeve's Dom. Rel., 3d ed., p. 307, note 1, and cases cited.

The only other question is as to the sufficiency of the second marriage to sustain the indictment. There was no satisfactory evidence that the marriage was solemnized by a minister of the gospel, or by any magistrate authorized by law to celebrate the rite. The statutes of this state only require the solemnization of marriages before a minister, priest, or magistrate,

and in the presence of witnesses, for the purpose of registration; for all other purposes, they are valid without such celebration and attestation: 3 R. S., 5th ed., p. 228, secs. 7, 8. The statute expressly declares that marriage, so far as its validity is concerned, shall continue in this state a civil contract, to which the consent of parties capable in law of contracting shall be essential: Id., p. 227, sec. 1. No particular mode of declaring or substantiating this consent is prescribed or required by law. The rules of the civil and common law, which were identical in this respect, prevail in this state. The essence of the contract, as of all contracts, is the consent of the parties; and its validity does not depend upon any form of celebration, or upon the fact of cohabitation. All that the law or religion requires is, that the consent be given in a deliberate manner, so as to show, beyond all question, the intent of the parties. The maxim of the civil law was, *Consensus non cubitus facit matrimonium*; and this is the rule of the common law; and the canon law adopts the same view. Swinburne, in his Book of Espousals, sec. 4, quoted in Shelford on Marriage and Divorce, p. 8, says: "That is a present and perfect consent, the which alone maketh matrimony, without either public solemnization or carnal copulation; for neither is the one nor the other the essence of matrimony, but consent only."

A contract *per verba de præsenti*, though not attended by consummation, constitutes a valid marriage, so as to avoid a second marriage followed by consummation: *Dalrymple v. Dalrymple*, 2 Hagg. Const. 66. The doctrine that the contract of marriage rests upon the same footing as any other contract, so far as its valid inception is concerned, is the doctrine of both the common and civil law. The consent of parties, without any peculiar forms or ceremonies, is all that is required to its valid celebration: Reeve's Dom. Rel., 8d ed., p. 196, and note; *Starr v. Peck*, 1 Hill, 270; *Fenton v. Read*, 4 Johns. 52; *Clayton v. Wardell*, 4 N. Y. 230; *Milford v. Worcester*, 7 Mass. 55.

It is said, however, that in order to constitute a valid marriage by contract *in præsenti*, the parties must be capable of contracting. This is, doubtless, true; and in order to a valid contract of any kind, the parties must be capable of contracting, that is, they must be of proper age and understanding, and must act voluntarily. But whether a marriage is celebrated *in facie ecclesie*, or is contracted by the present consent of the parties, it is the consent alone that creates the marital relation; and if either party is incapable of giving consent, there

is no marriage. The statute of bigamy is consistent with the common law, and recognizes any form of marriage, either for the first or second marriage, which would be good at common law; and the inquiry is, whether the marriage alleged was valid, that is, as to the first marriage, whether it was valid as a marriage in fact, and as to the second, whether it would have been valid but for the first, which rendered the accused incapable of contracting: 3 Greenl. Ev., sec. 205. The second marriage is a nullity; but it fixes the guilt of the accused, and subjects him to punishment for bigamy, instead of seduction, or any other offense known to the laws. The bigamist, although he is not capable of contracting the second marriage, may, nevertheless, "marry another person," so as to incur the penalty denounced against bigamy: 2 R. S., p. 687, sec. 8. And he may do this in any form, or by any words which, but for the legal bar, would constitute a good marriage. In *Rex v. Penson*, 5 Car. & P. 412, it was held that although the second marriage was to a woman who assumed a name not her own, which would have rendered a first marriage void, the party was, nevertheless, guilty of the crime of bigamy; that the parties could not be allowed to evade the punishment for an offense by contracting a concededly invalid marriage. And to the same effect, see *Rex v. Allison*, Russ. & R. C. C. 109. It was a question for the jury whether there was a present agreement between the parties to take each other for husband and wife; and as the presence of a clergyman was not essential to the validity of such contract, it is not material whether one or the other party, or both, were deceived or mistaken as to the character of the witness, or the character or efficacy of the substantiation of the contract. Most certainly, the prisoner should not be permitted to evade punishment by showing that he deceived his victim, not only as to his capacity to contract, but also as to the character of the individual called in to attest the contract; that he induced the female to believe that their union had the sanction of the church as well as the binding force of an enduring civil contract. There was no error in the charge that it was of no consequence whether the man represented to be a minister was such, or not. It is true, there is no valid exception to the charge. The exception is general, and the entire charge is conceded to be right, except this isolated clause. If it was supposed this was erroneous, the attention of the judge should have been called to it by a pointed exception. The refusal to charge, as requested, that

there could be no marriage by a mere agreement *in presenti*, so as to authorize a prosecution for bigamy, was, within the well-established rules of law, proper.

The judgment must be affirmed.

All the judges concurred.

Judgment affirmed.

PROOF OF MARRIAGE IN PROSECUTION FOR BIGAMY: See *Cameron v. State*, 48 Am. Dec. 111, and note 115, where the subject is discussed; *People v. Lambert*, 72 Id. 49. Agreement *in presenti* to marry, followed by cohabitation, is valid, though there was no solemnization: *Bissell v. Bissell*, 7 Abb. Pr., N. S., 20; S. C., 55 Barb. 329; *Durand v. Durand*, 2 Sweeny, 321. One indicted for bigamy cannot escape because the bigamous marriage was performed by one who, though he purported to be a clergyman authorized to solemnize marriages, was not in fact so authorized: *People v. Cook*, 6 Park. Cr. 48. All the above cite the principal case.

BISSELL v. NEW YORK CENTRAL R. R. COMPANY.

[25 NEW YORK, 442.]

COMMON CARRIERS MAY LIMIT THEIR LIABILITY FOR INJURIES TO PASSENGERS by negligence of agents or servants, by contract founded on a valuable consideration, such as abatement, in whole or part, of the legal fare; and such contracts are not contrary to public policy.

CATTLE DEALER ACCOMPANYING HIS CATTLE ON TRAIN, but paying no additional fare for himself, in consideration of the fact that he assumes all risk of personal injury, from whatever cause, while so riding free, cannot hold the carrier liable for injury resulting from negligence of the latter's agents or servants.

CONTRACT OF CATTLE DEALER TO EXEMPT CARRIER FROM LIABILITY FOR NEGLIGENCE, in consideration of privilege of riding with his cattle, if he pays full fare, is void, as being without consideration, *semble*.

ACTION for damages, for negligently killing plaintiff's husband while a passenger on defendant's railroad.

Sidney T. Fairchild, for the appellant.

Chauncey Tucker, for the respondent.

By Court, GOULD, J. It is fully conceded that, in this court, there is no question that the contract for carrying the cattle at reduced rates, in consideration that the owner assume certain risks as to them, is a valid contract. And this court (*Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181, and *Perkins v. N. Y. C. R. R. Co.*, Id. 196 [*ante*, p. 282]) has this year decided that a contract by a passenger, to take the risk of injury to his person in consideration of riding free, is a valid contract

In the case before us, the ticket upon which the deceased was riding, is a free ticket,—a pass without paying. And in consideration thereof, the passenger assumed all risks, etc. The same person, at the same time, made another contract, that in consideration of the carrying of his cattle at reduced rates, he assumed certain risks in regard to them; and in that contract he provided that the person riding free to take care of the cattle should assume certain risks. Calling these two contracts (together) one contract, makes no difference with the reason of the ruling applicable to each of them separately.

Do contracts, of which each separately is good, become invalid because combined or contained in one instrument? Is a passenger's contract to assume risks on one consideration (riding free) good, but bad when you add the other consideration that his cattle are carried at a reduced price? Further, if he may make a contract by which he shall ride free, may he not, by contract, say that he is riding free, although he has paid for the transportation of his goods? How has the court any right to alter his contract, and say that he is not riding free?

Again, if he may by contract assume certain risks, in consideration of riding free, why may he not make a contract to assume the same risks in consideration of being carried at half price, as he does for his stock? When we once hold that assuming these risks is within his power as matter of contract, the court has no power to interfere with his contract on the score of *quantum* of consideration, or on any ground but illegality of consideration.

The judgment of the supreme-court should be reversed, and a new trial ordered.

SELDEN, J. The following positions appear to be settled in regard to the duties and responsibilities of railroad corporations engaged in the transportation of persons and property in this state:—

1. In regard to the transportation of goods, they are subject to the absolute responsibility which rests upon common carriers, and are, therefore, insurers of the safe carriage and delivery of the goods, except against accidents towards the production of which no human agency has contributed.

2. In the transportation of living animals they are relieved from responsibility for such injuries as occur in consequence of the vitality of the freight, so far as such injury could not, by the exercise of diligence and care, be prevented; in other respects, their responsibility in regard to stock is the same

which rests upon them in regard to goods: *Clarke v. Rochester and Syracuse R. R. Co.*, 14 N. Y. 570 [67 Am. Dec. 205].

3. In regard to the transportation of passengers, they are not in any respect insurers, but are answerable for any injuries to their passengers, against which the utmost skill and foresight could guard: *Bowen v. N. Y. Central R. R. Co.*, 18 N. Y. 408 [72 Am. Dec. 529].

4. This responsibility embraces, not only any want of care and foresight on the part of the immediate agents of the corporation, but also any defects arising from want of care or skill in the manufacturers of the machinery or materials used in the structure or operation of the road, whether discoverable by any exercise of care and skill on the part of the immediate agents of the road, or not: *Hegeman v. Western R. R. Co.*, 13 N. Y. 9 [64 Am. Dec. 517].

5. The companies cannot limit their responsibility by any notice, though expressly brought to the knowledge of those whose persons or whose property they carry; but they may secure such limitation by express contract with those persons: *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. 485 [62 Am. Dec. 125].

6. Such limitation may be agreed upon in relation to the safety of property under any circumstances, whether carried gratuitously or for reward; and in relation to the safety of persons, when they are carried gratuitously: *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. C. R. R. Co.*, Id. 196 [*ante*, p. 282].

7. In such contracts, the companies may lawfully be relieved from all responsibility for the negligence or misconduct of their subordinate servants and agents, the question being as yet unsettled what servants or agents, if any, are to be regarded as so directly representing the company that a contract relieving the company from responsibility for their negligence or misconduct may not lawfully be made: Cases cited above.

8. Whenever the companies are authorized to relieve themselves by contract from liability for the negligence of their agents, no distinction is made in regard to the degrees of negligence against which they may stipulate: Same cases; also *Wells v. Steam Navigation Co.*, 8 N. Y. 375.

The questions which arise in this case are:—

1. Did the contract on which Mr. Bissell was traveling when the accident occurred, in its terms throw upon him the risk of personal injury from such circumstances as caused his death?

2. If the contract embraced such a case, was it valid and binding?

In regard to the first question, I think he must be regarded as traveling by virtue as well of the ticket as of the contract. They were both delivered at one time, and together constitute the contract. Each may be referred to in arriving at the terms of the whole contract, which was, in effect, but one, and not two.

That which is called the ticket was a part of the contract which Bissell might or might not have entered into. The effect of it was to give him the privilege of riding on the stock train or on the passenger train, at pleasure; and when he made that a part of the contract, he was bound by all its terms, as well as the company. The conditions as to personal risk, under the head of "notice" on that ticket, are not confined to such risk when riding on the passenger train, but extend to all personal risks when riding on any train, under the contract, treating it as one. The language is: "The owner of stock receiving this ticket assumes all risk of accident"; and that risk, as stated, covers all injury to stock or person, without reference to the train by which the person should be carried.

I do not, however, regard this as material, because the terms of the other portion of the contract appear to me equally broad. The expression "at their own risk of personal injury from whatever cause," in connection with the other words of the contract, cannot be held to exclude any injury which the party might receive, however occasioned, while riding or acting under the contract, and against which the company had a right to protect itself by contract.

The remaining question is, Was the contract valid?

And first, was Bissell "riding free to take charge of the stock," within the meaning of those terms as used in the contract? It is not claimed that he paid anything for his passage, aside from the seventy dollars per car-load which he paid for carrying the cattle. He was, therefore, doing exactly what the parties intended when they used the terms "riding free," and was bound by the contract to ride at his own risk as to personal injury. So far as the parties to the contract were concerned, he was "riding free"; whether, in view of the law, he was carried by the company gratuitously so as to authorize the company to relieve themselves from the consequences of negligence in his transportation, if their power to do so was limited to passengers thus carried, is another question. If it were necessary to decide that

question, I am not prepared now to say what my conclusion would be. But I do not regard it as necessary. The principle being established that railroads may, by contract, relieve themselves from the negligence of their servants in the carrying of passengers when carried gratuitously, I can discover no rule of law or public policy to prevent their doing it on any other terms which may be agreed upon between them and their passengers, and which shall furnish a consideration to the passengers for the risk which they assume.

All the arguments which have been urged against the propriety and safety of allowing carriers to make such contracts, apply with as much force to cases where passengers are carried gratuitously as where they are carried for reward. So far as the public are concerned, the question of reward is one of indifference; and so far as the parties are concerned, if they are allowed to make the contract at all, they are the judges of the amount of consideration which will compensate them for assuming the risk, whether the whole fare, or half, or an eighth or any other proportion, or other consideration. I apprehend it is entirely safe to leave them to fix the terms: *Shoemaker v. Benedict*, 11 N. Y. 192 [62 Am. Dec. 95]. I refer, of course, to actual contracts, and not to attempted limitations of the carriers' responsibility, by means of indorsements upon tickets, not assented to by the passengers who receive them.

If there was no limitation to the power of railroad companies in making such contracts, there would be great danger of public inconvenience in the establishment of such rule; but even then, after finding the law to be settled that such companies could protect themselves against liability by express contract, I should doubt the propriety of attempting to prescribe, by judicial decision, how great the consideration should be to render such contracts valid.

The legislature, however, has not left the matter at large, but has probably done all which is required for the protection of the public or of individuals in this respect, by guarding them against the necessity of negotiating with any railroad company on this subject. On the offer, by a passenger, of the fare prescribed by law, the company is bound to transport him, and to assume all the risks which fall within the appropriately stringent rules above adverted to; and in case of refusal, such company is made liable for all damages resulting from such refusal: Laws of 1850, c. 40, sec. 36. But if any one wishes to travel with greater economy than by paying the

fare which the legislature has prescribed (or in the absence of legislation, which usage has established: *Beekman v. Saratoga & S. R. R. Co.*, 3 Paige, 75 [22 Am. Dec. 697]), as the reasonable compensation for the transportation and risk, and prefers to pay less, or to pay nothing, and to assume the risk himself, I do not think there is either danger or impropriety in allowing it to be done; and there is no principle upon which my mind can rest to justify the position that courts shall recognize such a contract as valid, when the company, in consideration of the passenger's assuming the risk, agrees to carry such passenger without fare, and declare it void, when, for the same consideration, the company agreed to carry him for half-fare. The two cents a mile which the defendant is allowed by law to charge for carrying way-passengers, and three cents a mile for other passengers, is what the law adjudges (in the absence of usage fixing a less sum), to be a reasonable compensation for the expense of carrying the passenger, including the risk imposed by law, of his qualified insurance against injury. To hold that the defendant and the passenger may lawfully agree that the former shall be relieved from the risk, and the latter assume it, and then to add that no such agreement shall be valid unless the defendant gives to the passenger for assuming the risk the full compensation which the law allows it to receive for risk and transportation united, would not seem to be reasonable. I should regard it as far more rational to deny to the parties all power to contract on the subject.

Like all contracts, to render such a one valid, it is indispensable that it have some consideration, which it would not have if the passenger paid the full fare fixed by law. That is all which the company is allowed to receive for the service and the risk united, and it can no more demand the full compensation of both for the service alone than it could demand the fare for a hundred miles for carrying a passenger fifty miles. If the service is reduced, the amount of reward must be reduced in proportion; and if the company is relieved from the risk, it must make compensation for that relief by the reduction of fare, or otherwise. The amount of such compensation, like the consideration for all contracts, must be left to the agreement of the parties. The law has wisely, for the protection of passengers, guarded them against any necessity for negotiation on this subject. If they choose to do it voluntarily, I can discover no ground for saying that they may not make

such terms as they please. I entertain no doubt, therefore, that the contract in this case was valid.

It appears from the case that the defendant's superintendent testified on the trial that "the price of fare for cattle freight was uniform,—all one rate." From this it has been argued by the plaintiff's counsel that Bissell was neither "riding free," nor at a reduced rate of fare, at the time of the accident. I have already given my interpretation of the contract in this respect, which does not accord with this position; but whether such interpretation is correct or not, the position of the counsel cannot be made available, now, it not having been presented on the trial. The trial appears to have proceeded on the ground that the intestate was traveling on a free ticket, and that the only question in doubt was, whether the negligence of the defendant's agents was such as to render the defendant liable, notwithstanding the intestate was "riding free," under an engagement on his part so to ride "at his own risk of personal injury from whatever cause." If he, in fact, paid as a passenger the full fare allowed by law, or the usual fare, if less than that allowed by law, without reduction on account of his engagement to assume such risk, in my opinion the engagement would be without consideration, and not binding upon him or his representative. That question will doubtless be open to the plaintiff on a new trial; but as it was not presented, so far as the case shows, at the former trial, it cannot be considered here.

It is insisted that, if the contract was valid, it only relieved the defendants from responsibility for the negligence of the persons having charge of the train on which Bissell was riding. This is a mere question of interpretation of the contract. The question is, What did the parties intend by the words which they have used? The principle being established that parties may lawfully enter into contracts of this nature, there is no limit to the extent and variety of modification which may be given to such contracts. The passenger may assume all risks arising from the condition of the track, or from the condition of the locomotives, or of the cars, or all risks from the negligence of the agents, of all of them, or of any class of them. There is no danger which the party may encounter, resulting from the journey, which he may not assume the responsibility of, and he may assume all or any portion of it.

This contract in itself exemplifies all this. In regard to the stock, the owner assumes certain defined risks, confined to a

very narrow circle, and all the risks beyond those are still charged upon the company. On the other hand, with regard to his "own risk of personal injury," he assumes it by words as comprehensive as the language affords, "from whatever cause"; and he "expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person." I can imagine no injury which the passenger could receive as the consequence of his journey, against which the company has power to protect itself by contract, which is not embraced by these terms, and which he has not assumed. The terms of the contract in this case supply what was wanting in the case of *Wells v. Steam Navigation Co.*, 8 N. Y. 375, to exempt the carrier from responsibility for the negligence of agents.

The thirty-sixth section of the general railroad law, which has already been adverted to, has been relied upon as establishing the defendant's liability in this case. That section is in the following words: "Every corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice; and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junctions of other railroads, and at usual stopping-places established for receiving and discharging way-passengers and freights for that train; and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises."

The argument based upon this statute, if it proves anything, proves too much. If that section is applicable to this case to sustain the position for which it is cited, notwithstanding the terms of the contract, under which the interstate was carried, I do not see why it would not render railroad companies absolutely "liable to the party aggrieved in an action for damages for any neglect" in the transportation of persons or property. It would seem to make them insurers of the safety of passengers, as they were, at common law, of the safety of freight, against all dangers not arising from the act of God, or the public enemies, and to superadd to that stringent rule of liability a prohibition against the modification of it by contract. Such an application of the statute would show all

the decisions of this court, sustaining the right of railroad companies to reduce the extent of their liability by express contract, to have been erroneous. But if the statute should receive an interpretation more favorable for the carriers, as not increasing their liability, it can have no force in support of the argument in aid of which it is invoked, unless it is held to prohibit contracts by carriers reducing their liability; which would render it equally in conflict with the decisions before mentioned. The true object of this section of the statute has, as it appears to me, been correctly declared in this court, viz., "to bring these railroad lines within the general principle of common carriers, with such variations as the nature of the business required": *Wibert v. N. Y. & E. R. R. Co.*, 12 N. Y. 250. I do not think it was any part of that object to add to their general responsibility as carriers, or deprive them of the power which they possessed prior to its passage, of making contracts in regard to such responsibility.

There are several exceptions in the case which properly present the principal points which I have considered, and which are well taken.

The judgment should be reversed, and a new trial granted.

SMITH, J. In the cases of *Wells v. New York Central R. R. Co.*, 24 N. Y. 181, and *Perkins v. New York Central R. R. Co.*, *Id.* 198 [*ante*, p. 282], this court decided—six judges concurring—that the carriers of passengers, as well as other common carriers, might restrict their common-law liability by express contract. In each of those cases, the passenger was riding on a free ticket. In this case, in like manner, the plaintiff's intestate was riding ostensibly also upon a similar free ticket. I do not see why this case is not precisely within the rule established in those cases, and why the doctrine of *stare decisis* does not require us to reverse the judgment in this case. The fact that the plaintiff's intestate was riding in defendant's cars to accompany his stock, carried as freight, and for which the customary charges were paid and received, cannot, as I see, affect the question. The ticket which Bissell received, and which he used as a voucher to show his right to ride in a passenger-car, was, in fact, a free ticket. He received it as a free ticket. Besides the indorsement on the ticket, he signed an express agreement, in which he engaged to take his risk in respect to all accidents or injuries to his person from the negligence of the defendant's agents, or whatever cause. The argument that the rule in the *Wells* and *Perkins* cases cannot apply in

this case, because there was, in fact, a consideration received by the defendant for the carriage of the plaintiff's intestate, is not, I think, sound. It disregards the force of the ticket which he received, and on which he was, in fact, riding at the time of the accident, and which he received and used as a free ticket, and for which he professedly paid no fare separately from the price paid for the transportation of his stock. But it is undoubtedly true that he received such free ticket, and it was given him by the defendants in consideration of the business and profits received from him from the freight of the stock which he accompanied. So in all cases when free tickets are given, I suppose there is some consideration of interest, or profit, or advantage, received or expected, which constitutes the inducement to the giving of the ticket. In this sense, there would probably seldom, if ever, be given by a railroad company a strictly free ticket. Nor does the liability of the carrier depend upon the question whether he received any actual pecuniary or other consideration for the transportation of a person over their road. Receiving a passenger into their cars for transportation binds the carriers to carry him safely, —as much so with a passenger who has paid no fare as with one who has paid full fare and purchased the customary ticket; and subjects them to an action for damages for any injury resulting from the negligence of themselves or their servants and agents. The exemption from such liability rests solely upon the ground of express contract. The fact that Wells and Perkins, in the cases referred to, applied for and received, respectively, a free pass, was doubtless the reason why they made the agreement to take their own risks. The company, for the same reason, made that a condition of giving them a free pass. It could not have made or imposed any such terms or conditions upon a person paying his fare; for upon the payment of the customary fare, they were bound to carry such passenger at their own risk in respect to all injuries resulting from the negligence of the company, its agents, or servants.

It cannot be material, as I conceive, whether a person who receives a free pass and agrees to take his own risk of accidents, and to become, in effect, his own insurer against the casualties of the trip, receive such free ticket to enable him to accompany his property, or for any other reason or consideration. If he takes the free ticket and assents to the agreement indorsed thereon, or otherwise expressly agrees to take his own risk, he must, in either case, abide by his contract, and is bound thereby.

In the decision of this case at the general term of the supreme court, I expressed the opinion that the action could be sustained on the ground that the negligence of the brakeman was the negligence of the corporation, for the reason that he was improperly employed, and was unfit for his station. This view, I am satisfied, was erroneous. The case was not tried upon this theory. I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

DAVIES and ALLEN, JJ., were also for reversal.

DENIO, C. J., filed a dissenting opinion.

WRIGHT and SUTHERLAND, JJ., also dissented.

Judgment reversed, and new trial ordered.

POWER OF CARRIERS TO LIMIT COMMON-LAW LIABILITY BY CONTRACT, and liability of carriers respecting persons riding gratuitously, and persons accompanying live-stock on free pass, and the like: See the extensive note on this topic to *Perkins v. N. Y. Central R. R. Co.*, ante, p.282. It is uniformly held in New York that common carriers may limit their common-law liability for injuries to passengers by negligence, by special agreement, and such contracts are held not to be against public policy: *Lee v. Marsh*, 43 Barb. 105; *Price v. Hartshorn*, 44 Id. 666; *Breese v. U. S. Tel. Co.*, 45 Id. 293; S. C., 31 How. Pr. 98; and 48 N. Y. 142; *Westcott v. Fargo*, 63 Barb. 353; S. C., 6 Lana. 321; *Stinson v. N. Y. Central R. R. Co.*, 32 N. Y. 337; *Guillaume v. Hamburgh & A. P. Co.*, 42 Id. 214; *Steinway v. Erie R'y Co.*, 59 Barb. 675, note; S. C., 43 N. Y. 126; *Blossom v. Dodd*, Id. 267; *Lamb v. Camden & A. R. R. Co.*, 46 Id. 286; *Nelson v. Hudson R. R. R. Co.*, 48 Id. 503; *Maguin v. Dismore*, 56 Id. 174. In *Nichols v. N. Y. Cent. & H. R. R. R. Co.*, 4 Hun, 229, S. C., 4 Thomp. & O. 606, and *Breese v. U. S. Tel. Co.*, 48 N. Y. 142, it is said that carriers may limit their common-law liability except as against their own negligence or fraud; and especially where the carrier is a corporation managed by a board of directors: *Heineman v. Grand T. R'y Co.*, 31 How. Pr. 464; S. C., 1 Sheldon, 121; *Knell v. U. S. & B. Steamship Co.*, 1 Jones & S. 433. In New Jersey, a stipulation for immunity from liability in consideration of a free pass, is held valid: *Kinney v. Central R. R. Co.*, 32 N. J. L. 413; and so in Massachusetts, it is held that there is nothing contrary to public policy in a railroad company relieving itself by contract from liability for injuries to persons riding free or at a reduced fare in consideration thereof: *Squire v. New York Central R. R. Co.*, 97 Mass. 247. In *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 186, it is said that though these are the rules in New York, it has been held to the contrary in the United States supreme court, in *N. Y. Central R. R. Co. v. Lockwood*, 17 Wall. 357, and that such ruling would be entitled to great consideration had not the rule become settled beyond review in New York courts. In *Jacobus v. St. Paul & C. R. R. Co.*, 20 Minn. 129, it is held that carriers cannot exempt themselves from liability for injuries to persons riding free, but that they must use the same care toward such persons as to persons riding on full fare; and in *Hooper v. Wells, Fargo, & Co.*, 27 Cal. 45, 46, it is said that the New York rule is contrary to public policy and opposed to the weight of the best English and American authority.

And so in *Roe v. Des Moines V. R. R. Co.*, 39 Iowa, 254. In the absence of any express contract, the liability of a carrier to persons riding free is the same as to other persons: *Blair v. Erie R'y Co.*, 66 N. Y. 317. In *Pierce v. Milwaukee and St. Paul R'y Co.*, 23 Wis. 391, the court say that whatever the rule as to exemption of carriers by contract from liability for negligence as to free passengers, a person riding free with his cattle is not a gratuitous passenger. But while carriers may so stipulate against liability, in New York, by express contract, yet it is said that they cannot so limit their liability by notice printed on the passenger's ticket or on the receipt for goods, even though such notice is brought to the knowledge of the passenger or sender of the goods: *Rawson v. Pennsylvania R. R. Co.*, 2 Abb. Pr., N. S., 224; *Belger v. Dinmore*, 51 Barb. 78; S. C., 34 How. Pr. 423; *Kirkland v. Dinmore*, 2 Hun, 51; S. C., 4 Thomp. & C. 309; *Lienan v. Dinmore*, 10 Abb. Pr., N. S., 212; S. C., 41 How. Pr. 99; and 3 Daly, 369. In *Mynard v. Syracuse B. & N. Y. R. R. Co.*, 7 Hun, 401, it is held that in a stipulation by a carrier to limit liability, the words "from whatever cause" cover negligence. All of the above cite the principal case.

THE PRINCIPAL CASE IS CITED IN *Wooden v. Austin*, 51 Barb. 11, as an authority on the question of liability of carriers generally; in *Sunderland v. Westcott*, 40 How. Pr. 469, S. C., 2 Sweeny, 263, to the point that common carriers of passengers are not insurers at the common law, but are only liable for such injuries as the utmost human skill and foresight could not guard against; and in *Cragin v. N. Y. Cent. R. R. Co.*, 51 N. Y. 63, and *Lehey v. Hudson River R. R. Co.*, to the point that carriers are relieved from such liability concerning live-stock as occurs in consequence of the vitality of the freight.

GRISWOLD v. HAVEN.

[25 NEW YORK, 565.]

WHERE AUTHORITY OF AGENT OR PARTNER DEPENDS UPON SOME FACT outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact.

WHERE ONE OF FIRM OF WAREHOUSEMEN FALSELY REPRESENTED to a person who advanced money on the faith of such representation, that he had on storage with the firm a certain quantity of grain, the innocent partners were held bound by such representation and by the firm receipts given by the former for such money, and responsible therefor.

WHERE PARTNER FALSELY REPRESENTED THAT HE HAD GRAIN ON STORAGE with his firm of warehousemen, and sold the same, giving the firm receipt for the price, the purchaser suing for conversion of the grain was entitled to recover, though evidence was improperly received which showed that the grain never had existence.

MEASURE OF DAMAGES IN ACTION FOR CONVERSION OF GRAIN is the market value of ordinary merchantable grain of the kind alleged to have been converted.

ACTION for conversion of grain and for damages. The opinion states the facts.

S. P. Nash, for the appellant.

Skeffinton Sanxay, for the respondent.

By Court, SELDEN, J. This case presents two questions: 1. Whether, under the facts disclosed, the firm of Haven, Sloat, & Co., are liable at all to the plaintiff; and 2. If liable, whether that liability can be enforced in the present action.

The principles upon which partnerships are held responsible for the acts of one of the partners, are analogous to, and in most cases identical with, those upon which employers are bound by the acts of their agents. The defendant Wright is to be regarded as the general agent of the firm as to all matters within the scope of the partnership business, and the liability of his partners in the present case depends mainly upon a question arising upon the law of principal and agent, which has been discussed in several recent cases, and especially in the cases of *Mechanics' Bank v. New York and New Haven R. R. Co.*, 13 N. Y. 599; and *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 Id. 125 [69 Am. Dec. 678]; S. C., 14 Id. 623.

In the former of these cases, the plaintiff sought to recover for a fraud committed by Robert Schuyler, who was the agent of the railroad company for transferring its stock. The alleged fraud consisted in issuing to one Kyle a spurious certificate for eighty-five shares of the capital stock of the company, and thus falsely representing that Kyle was the owner of such stock, when in truth he owned no stock, and was not entitled to the certificate. Kyle had borrowed money of the plaintiff, and assigned the certificate as security.

It was a sufficient answer to the action that Kyle, to whom the certificate was issued, being privy to the fraud, had, of course, no claim against the company, and that his assignees could have no greater rights than himself. But the learned judge who delivered the only opinion which has been reported in that case, seems to have put the decision upon other grounds. He assumed that the principal is never bound by the act of his agent, unless he has in reality authorized it, or has, by his declarations or conduct, given to the agent a semblance of authority for its performance. The act must, he insisted, in all cases be brought within the actual or apparent powers of the agent.

This is doubtless a sound general rule, but there are, I apprehend, some exceptions. It is admitted in that opinion that

the principal is responsible for a false representation by his agent, not authorized by or known to the principal, if such representation is made in connection with an act which the principal has authorized. But this, it is said, is "because the fraud enters into and is a part of the authorized transaction." This reasoning was not, as we have seen, necessary to the conclusion at which the court arrived. There is a class of cases to which it does not, in my opinion, apply; viz., cases where the act of the agent, so far as the party dealing with him has any means of discovering, is within the power, but where, by reason of some fact known to the agent and concealed or misrepresented by him, it in reality exceeds his power. Take, for example, the case of a forwarder who carries on his business through an agent. Such agent would, from the nature of the business, have power to give written acknowledgments of the receipt of property to be transported; but would, whether specially restricted or not, have no authority to give such an acknowledgment when no property had been received; and every person dealing with him would be bound to take notice of this limitation of his powers. Suppose, then, a dealer in produce to apply to a banker for the discount of a draft drawn against property alleged to have been delivered to this agent to be transported to market, and to produce the written statement of the agent, addressed to the banker himself, acknowledging the receipt of such property, upon the faith of which the draft should be discounted. Here the act of the agent, the facts being known, would be within neither the real nor apparent powers of the agent. And yet to hold the principal not liable, would, I think, do great injustice, and would seriously disturb a very extensive system of trade. The question is, Who is to bear the consequences of this false and fraudulent representation of the agent?

In the opinion of the case of *Mechanics' Bank v. New York and New Haven Railroad Company*, 13 N. Y. 599, it is argued in reference to cases of this sort, that "a man can no more enlarge than he can create a power by any representation which he can make." This is, no doubt, strictly true. But the answer is, that in the case supposed, and others of that class, the fact misrepresented forms no part of the power itself. The precise extent of the power admits of no doubt. It is known to all the parties concerned. But there is a fact *dehors* the power well known to the agent, but misrepresented by him, which prevents his having a right to act. Who, in

justice, should be responsible for this fraud of the agent? It seems to me eminently a case for the application of Lord Holt's rule, that where one of two innocent parties must suffer from the fraud or misconduct of a third, he who has reposed a trust and confidence in the fraudulent agent ought to bear the loss: *Hern v. Nichols*, 1 Salk. 289. The existence of any such rule was, as I understand, virtually denied in the opinion referred to, in the case of *Mechanics' Bank v. New York and New Haven Railroad Company*, 13 N. Y. 599. This denial was essential to the maintenance of the principles there laid down, as the rule, if admitted, would embrace many cases which could not be reconciled with those principles. It would seem, however, too reasonable in itself, and too well established by authority, to be shaken. It has been quoted and adopted by many eminent judges, as well as by nearly every elementary writer upon the law of principal and agent, since the days of Lord Holt. One or two only of these authorities will be referred to here, for the purpose of bringing out a single idea.

The liability of principals for the negligence and for the frauds of their agents rests upon the same grounds. The language of Lord Holt, in *Hern v. Nichols*, 1 Salk. 289, was evidently the result of a settled opinion, as he had previously laid down the same rule in reference to the liability of a principal for the negligence of his agent. In the case of *Lane v. Cotton*, 12 Mod. 472, 490, he says: "For when a trust is put in one person, and another whose interest is intrusted to him is damaged by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damaged." Paley, in his work on agency, page 294, treats of the liability of principals for the negligence and frauds of their agents, in the same section, and places the language just quoted from Lord Holt at its head. Mr. Justice Buller, also, in the case of *Fitzherbert v. Mather*, 1 Term Rep. 16, adopts the same classification, and confirms the rule in the following emphatic terms: "It is the common question every day at Guildhall, Where one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit?" Again, Mr. Chitty says: "Though a principal is not in general liable, criminally, for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit, or any other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts": 8 Chitty's Com. Law, 209.

If this classification is correct,—and it is concurred in by all elementary writers,—then the idea that the responsibility of a principal for the frauds of his agent rests in all cases upon the ground that he has in some way, either actually or apparently, authorized the fraudulent act, or has received the benefit of the fraud, and therefore adopted it, must be given up. It would be a very artificial and unnatural mode of reasoning that should apply that doctrine to the principal's liability for the negligence of his agent; and this liability and that for fraud belong to the same class, and rest upon the same reason. That reason is, that every person employing an agent is under obligation to pay some regard to the diligence, skill, and integrity of the agent he selects, and to his fitness to perform the duties with which he is charged. The decision of this court in the case of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 14 N. Y. 623, S. C., 16 Id. 125 [69 Am. Dec. 678], was placed explicitly upon this ground, and can be sustained upon no other. The act of the teller in that case in certifying the checks was wholly unauthorized. There was not even a semblance of authority, if the holder was bound to ascertain whether the drawer had funds to meet them. The court, nevertheless, held the bank liable, and every judge who wrote in the case (except Judge Comstock, who dissented) concurred in the rule laid down in the case of the *North River Bank v. Aymar*, 3 Hill, 262. This rule is restated in the case of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125 [69 Am. Dec. 678], as follows: "Where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it."

It is insisted, in the present case, that the decision in the case of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125 [69 Am. Dec. 678], proceeded upon some principles applicable solely to negotiable paper, and which have no application here. This, certainly, is not the case in respect to the opinion published in 16 New York reports, p. 125; and although the reasoning of Judge Denio (14 N. Y. 623) is based mainly upon rules drawn from the law of negotiable paper, yet the opinion of Judge Cowen in *North River Bank v. Aymar*, 3

Hill, 262, which the chief judge especially commends, argues the question throughout upon the law of principal and agent, and not at all upon principles peculiar to negotiable paper. He also cites Lord Holt's rule in the case of *Hern v. Nichols*, 1 Salk. 289, as the basis of the defendant's liability.

No doubt the negotiable character of the paper was essential to the plaintiff's right of action, both in the case of *North River Bank v. Aymar*, 3 Hill, 262, and that of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 14 N. Y. 623, S. C., 16 Id. 125 [89 Am. Dec. 678], because the only representation by the agent was in assuming to be authorized to execute the paper, and this being made primarily to another party, himself cognizant of the fraud, would, aside from the negotiable words, have afforded no ground of action to the plaintiff. The cases would then have been precisely like that of *Mechanics' Bank v. New York and New Haven Railroad Company*, 13 N. Y. 599. But by means of the negotiability of the paper, a direct privity was created between the maker of the paper and the holder. The law merchant gives effect to a negotiable instrument according to its terms. As those terms import a dealing between the maker and each person to whom the instrument may be transferred, it is so treated. Hence any representation upon the face of paper of this description is considered as made directly to every one who may become its *bona fide* holder: *Polhill v. Walter*, 3 Barn. & Adol. 114. The mere assumption by a partner or agent of power to execute such paper is a virtual representation to all who may take it of the existence of every fact essential to the power. In no other respect was the negotiability of the paper of any importance in the two cases referred to.

These cases, therefore, must be considered as establishing the doctrine that, where the authority of an agent depends upon some facts outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact. There is no difference in this respect between the liability of the principal for the fraud of his agent, and that of a partnership for the fraud of one of its members. Judge Story, in treating of the liability of partnerships in such cases, says: "The whole doctrine proceeds upon the intelligible ground that when one of two innocent parties must suffer by the act of a third person, he shall suffer who has been the cause or the occasion of the confidence

and credit reposed in such third person": Story on Partnership, sec. 108. Mr. Collyer, also, places this language of Judge Story at the head of the section in which he treats of this class of liabilities, and expressly applies the principle to the case of negotiable securities, fraudulently issued by one of the partners: Collyer on Partnership, Perkins's ed., p. 401, secs. 445, 447.

It is clear, therefore, that cases like those of *North River Bank v. Aymar*, 8 Hill, 262, and *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 14 N. Y. 623, S. C., 16 Id. 125 [69 Am. Dec. 678], as well as that entire class of cases in which it has been held that a partnership is liable to a *bona fide* holder upon a negotiable note fraudulently issued in its name by one of the partners, all depend upon one common principle. The mode in which the liability is enforced in all these cases is by estoppel *in pais*. The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented. The applicability of the doctrine of estoppel to cases, in all respects parallel to these, is asserted by Judge Denio in the case of *Genesee Bank v. Patchin Bank*, 13 N. Y. 309. The ground of liability, and mode of enforcing it, by estoppel, in the case of the certified checks, was precisely the same as if the teller, instead of writing the word "good" upon the face of the checks, had simply answered verbally to the inquiry of a person about to take the checks that the bank had funds of the drawer to meet them, and the action had been brought by the person to whom such statement was made. The teller would be the proper source of information on the subject, and whether bound to answer such inquiry or not, if he chose to do so, the bank, upon the principles which have been adverted to, would clearly be bound by his answer, and would be estopped from controverting it by proof. I see no way in which the present case can be distinguished, in principle, from such a case, or from the class of cases to which I have referred. The plaintiff knew the extent of Wright's powers; that is, that he had no right to give the receipt, or make the representation, unless the grain had been actually received; but he could ascertain the fact whether it had been so received only through Wright himself. A personal examination of the warehouse would not have enlightened him, as it could not be distinguished from other grain of the same sort. If, then, the

firm is not liable, there is no security in dealing with property represented to be in the hands of warehousemen or forwarders.

There are some English cases which have been frequently cited in opposition to the doctrine adopted in this case, and which, although briefly commented on in the case of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 14 N. Y. 623, S. C., 16 Id. 125 [69 Am. Dec. 678], it may be well again to notice, as a more extended analysis will show, I think, that they are of very little weight as opposed to that doctrine. The first of these cases is that of *Grant v. Norway*, 10 Com. B. 665. The master of a ship owned by the defendants had signed and delivered a bill of lading, in the usual form, for goods which had never been shipped. The plaintiffs, upon the faith of this bill of lading, and upon its deposit with them, had made advances to the parties appearing by the bill to have shipped the goods. Upon discovering that no goods had been shipped, they brought their action against the owners of the ship.

Now, upon the principles maintained here, this was a very plain case. The parties to whom the bill of lading was given had, of course, no right of action, because they were cognizant of the fraud, and the plaintiffs had none, because no representation was made to them. Had the bill of lading been a negotiable instrument, the plaintiffs would have been in precisely the same position as persons who become *bona fide* indorsers of the negotiable note of a partnership fraudulently issued by one of the partners. A privity between the parties would then have existed through the negotiable character of the paper, and the defendants would have been estopped by the act of their agent from setting up that no goods had been shipped.

The case was argued before three judges only, and it appears from the course of the argument that, while the attention of the chief justice was wholly given to the question whether the act of the agent was within his powers, that of Creswell, J., was directed mainly to the view of the case which I take. For the latter judge not only distinguishes the case from that of *Herr v. Nichols*, 1 Salk. 289, upon the precise ground taken here, as is shown by the language quoted from him in the case of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125 [69 Am. Dec. 678]; but subsequently he puts this case: "Suppose this were not the case of an indorsee of a bill of lading, but that of the owner of the goods, who really sent them by a carrier for the purpose of their being shipped, and the master gives a receipt to the owner of the goods, but

the carrier fails to deliver them; in that case the owner would be induced, by the captain's receipt, to abstain from pursuing the thief; but is the indorsee of the bill, under the circumstances supposed, in the same position as the original owner of the goods?"

This supposition clearly shows the judge who made it to have, for the moment at least, adopted the views which I have presented, for he puts the case in the precise form to obviate the objections which I say existed to a recovery by any one against the owners of the ship, viz., the want of any representation at all to the plaintiffs, and the knowledge by the party to whom the representation was made, that no goods had been shipped.

The opinion of the court, which was delivered by the chief justice, is not in conflict with these views, though it does not support them. It purports to establish two points, in which I entirely concur, viz.: 1. That the master had no authority to sign a bill of lading for goods not shipped; and 2. That persons dealing with him were presumed to know that his powers were thus limited. But as to the question whether a false representation that the goods had been shipped, made by the master directly to an innocent party who should act upon such representation, would bind the owners, the opinion is entirely silent. This is a view of the case which the chief justice evidently had not considered.

In the subsequent case of *Coleman v. Riches*, 29 Eng. L. & Eq. 323, the point here discussed forced itself upon his attention. The defendant, Riches, was a wharfinger, his business being in charge of one Board, as his agent. The plaintiff, Coleman, was a dealer in produce, and in the habit of buying grain to be delivered at the defendant's wharf, and paying for it upon the receipt of Board, the agent. The plaintiff purchased a quantity of wheat of one Lewis, and ordered it delivered at the defendant's wharf. He afterward met Lewis, and Board, the agent, together, and Lewis stated in Board's presence that he had delivered the wheat, at the same time producing and delivering to the plaintiff Board's receipt. The action was against Riches, for the misrepresentation of his agent contained in the receipt.

Upon the argument, the chief justice, among other things, remarked that "the misrepresentation was in fact made by Lewis, though Board enabled him to make it, and was present when he made it"; and thereupon Creswell, J., said: "Riches

or his agent made the representation as to the receipt to the party who delivered the goods, and not to the buyer."

These remarks recognize most distinctly the real difficulty in the case, which was, to make it appear that the false representation had been made by the agent, Board, to the plaintiff. To establish this, the council argued that, as Riches knew that the receipts were given for the purpose of being taken to the plaintiff, they were to be regarded the same as if given directly to him. But to this Jervis, C. J., and Williams, J., replied in substance that they were unable to see how it could be made out that the representation was made to Coleman, the plaintiff.

It is quite apparent, therefore, that if the agent of Riches had made the false representation as to the delivery of the wheat, directly to the plaintiff Coleman, the action would have been sustained. This inference is strengthened by what is said by the chief justice in his opinion, in which he admits that if Riches had agreed with Coleman that such receipts should be given, the case would have been different. He did not, of course, mean an agreement that the agent should give receipts for wheat not delivered. The receipt would still have been, if the supposed agreement had existed, without even the semblance of authority, a mere false representation by the agent. The only difference the agreement could make would be to create such a privity of dealing between Riches and Coleman as to cause the receipts, although given in the name of the vendor of the wheat, to be treated as if given directly to Coleman, the purchaser. This coincides with the view which I have taken of the present case. These two cases have been dwelt upon thus at length, because, although frequently cited and relied upon in opposition to the position taken here, I think, when closely examined, they tend rather to confirm it than otherwise. I have no hesitation, therefore, in holding that, under the circumstances of this case, the defendants were bound by the representations of Wright,—I mean the verbal representations, and not the representations contained in the receipts. Although he may not have been bound to answer the inquiry as to the wheat, yet a warehouseman cannot but be considered as acting in the proper line of his business in answering such inquiries respecting the property he has in store; and if he consents to answer, is bound to answer truly. It cannot be material whether he is questioned on the subject at his warehouse or elsewhere,—the

inquiry being addressed in the way of business, by one known to be about to act on the information which may be given in reply. As a matter of evidence, bad faith would be much less readily attributed to one answering such inquiries away from his place of business, if the case were open to a presumption of mistake; but whatever circumstances may attend the inquiry, absolute good faith must be alike required in the answer.

The only remaining question is, whether the plaintiff can enforce his claim in the present action, the complaint in which does not purport to claim damages for the fraud of Wright, but for the conversion by the defendants of property belonging to the plaintiff. Although an actual conversion is not averred, yet a demand and refusal, which are evidence of a conversion, being alleged, a conversion forms the gist of the action. There would, no doubt, be an incongruity in permitting a recovery in such an action for property shown never to have had an existence. But the plaintiff in this case objected upon the trial to all proof on that subject. If this objection was well taken, the case, as now situated, is to be disposed of as if no such evidence had been received. A new trial cannot be properly granted upon evidence which was objected to, and improperly admitted. The defendant's counsel is, as I think, wrong in assuming that it appeared from the plaintiff's own showing that the grain had no existence.

Were the defendants, then, estopped by the representations of Wright that the grain was in store from proving the contrary upon the trial? The only elements of an estoppel *in pais* are the assertion of a fact by one party, and such action by the other party, in reliance upon the assertion that he will be injured and virtually defrauded, if the fact asserted is disproved. It would seem difficult to imagine a case more directly within the doctrine than the present. If the firm is bound at all by the representations of Wright, it would seem, upon principle, that it must be estopped from proving the contrary.

The case of *Austen v. Craven*, 4 Taunt. 644, is relied upon to show that an action of trover would not lie in such a case. But that case differed essentially from this. It was founded upon a mere executory contract for the delivery of a certain quantity of sugar of a certain description. The party under whom the plaintiff claimed had never been entitled to any specific sugar, and this necessarily appeared in the case.

When the plaintiff's counsel attempted to argue from the defendants' admission that the sugar must have been separated from the bulk of the stock, Gibbs, J., interposed, saying: "Their language is explained by the other evidence." It is obvious, therefore, that the case was decided upon the ground that, taking the whole evidence together, the defendants had not admitted the possession of any specific sugar to which the plaintiffs' assignor had title. The opinion of Mansfield, C. J., shows that this was the ground of the decision. The present case is entirely different. Here the representation of Wright, if taken as true, showed the defendants in possession of certain specific grain delivered to them by Ford. There was no such difficulty as existed in *Austen v. Craven*, *supra*.

The case of *Harding v. Carter*, Park on Insurance, 4, is far more like the present. The defendants in that case, who were brokers, had written to the plaintiff, the master of a ship, that they had effected two policies of insurance, one on his account, the other on account of the owners, naming the underwriter. The ship was lost, and the defendants then produced a different policy, with another underwriter, and only insuring the ship, in which the plaintiff had no interest. The plaintiff, therefore, brought an action of trover, for the policy described in the letter. In defense it was said, as it is here, that trover could not be maintained for that which never existed. But Lord Mansfield, before whom the case was tried, "would not suffer the defendants to contradict their own representation," and the plaintiff recovered. As this case cannot be distinguished from that before us, and as I think it clearly right, I do not hesitate to follow it.

The difficulty suggested in regard to proving the value of property which has had no existence, is more imaginary than real. The same difficulty would exist in an action to recover for the fraud. The plaintiff in such an action could recover no more than the value of the grain. As the quantity was specified in the receipts, it was his own folly if he advanced more than its value. The market price of ordinary merchantable wheat, etc., would be the criterion of value and the measure of damages.

It is not necessary to notice the other technical points raised upon the argument. The order for a new trial should be reversed, and final judgment should be rendered for the plaintiff upon the verdict.

DENIO, C. J., dissenting. There was sufficient evidence for the jury to have found, if the case had been submitted to them, that the receipts upon which the plaintiff advanced his money were false and fictitious, and that they were fabricated to enable Wright, and the person calling himself Samuel Ford, or one of them, to defraud the plaintiff.

There being no such wheat delivered to the defendants, or held in store by them as the papers professed to represent, the first question is, whether this action can be sustained, even upon the assumption that the defendants are legally responsible in some form for the acts of Wright. Whatever the form of this action might have been called when pleadings were technical, it is quite clear that the complaint presents a case of an alleged tortious interference by the defendants with the rights of property of the plaintiff as the owner of a quantity of wheat. It contains the elements of replevin in the *detinet*, to which it is also assimilated by the prayer that the grain may be delivered to the plaintiff. It also contains, argumentatively, the elements of an action of trover, for it alleges property in the plaintiff, possession by the defendant, and a demand and refusal, which is the usual evidence in such cases of a conversion. It does not allege that the storehouse receipts were false or fictitious, but it relies upon them as though they were valid, and sets out a title under them as operative papers.

The plaintiff's counsel does not controvert this view of the effect of the complaint, or the rule that replevin and trover will in general only lie for specific personal property, but he insists that the defendants are estopped to deny that the wheat referred to in the receipts was actually on hand in their storehouse when the plaintiff demanded it. But I am of opinion that the doctrine of estoppel cannot be applied to such a case. The effect of an estoppel *in pais* is to oblige the party affected by it to respond to the one entitled to the benefit of it, to the same extent as though the facts actually existed according to the representations made. The judges and jury and sheriff are not required to shut their eyes, and by an effort of the imagination to produce the circumstances represented by the defendant, and to act in conducting the trial and in the machinery of the process as though these supposed circumstances had a real existence. Replevin and trover will only lie in respect to actual and specific personal property, and neither of these actions can be sustained to recover for a

breach of promise, or for damages arising out of deceit or misrepresentation respecting alleged chattels which never had an existence. In *Austen v. Craven*, 4 Taunt. 644, the plaintiff sued in trover for fifty hogsheads of sugar. It appeared that one Kruse had purchased that quantity of sugar of the defendants, to be delivered at a future time, but the contract was executory, no particular hogsheads of sugar passing from the defendants to Kruse; but the latter sold the sugar referred to in his contract to the plaintiff. The plaintiff gave notice of his intended purchase to the defendants, and inquired whether they had fifty hogsheads of sugar belonging to Kruse, and whether he, the plaintiff, might safely purchase them of Kruse and pay him the price; to which they answered in the affirmative, and said they had the fifty hogsheads and would deliver them. The plaintiff accordingly paid Kruse the money, but the defendants, on a demand subsequently made, refused to deliver any sugar. The plaintiff's counsel urged the estoppel in this manner: "It appears by the defendants' admissions [referring to what they said in answer to the plaintiff's inquiry] that these goods had been separated from the bulk of their stock, for they said they had the fifty hogsheads belonging to Kruse, which they would deliver to the plaintiff. If they had any fifty hogsheads of that quality in their warehouse, they must, after that declaration, be deemed to have appropriated them to the plaintiff, and could not say they were not his property." A motion to set aside the verdict and enter a nonsuit was granted.

Sir James Mansfield, chief justice of the common pleas, said: "Trover cannot be maintained but for specific goods. Any sugars of required quality would have answered this contract. It is a contract for a certain quantity of a specified quality," etc. The facts constituting the estoppel were of precisely the same character, and just as strong as those in the case before us. *Chapman v. Searle*, 3 Pick. 38, at first view, would seem to be in conflict with *Austen v. Craven*, 4 Taunt. 644, but I think it is not in fact. Ludlow was the purchaser of three hundred barrels of beef of the defendant, and received from him a bill of parcels, and a receipt in full for the price, and a certificate stating that he (defendant) had received three hundred barrels of beef in store for him, Ludlow. The plaintiffs were Ludlow's assignees under an insolvent's assignment, and they demanded the beef of the defendant, who refused to deliver it, when they brought this action of trover.

The defendant, it was shown, had considerable quantities of beef in different parts of Boston. The defendant, it seems, undertook to prove that the papers did not exhibit the real transaction; that it was merely a paper arrangement; that no goods were sold and delivered, or held by the defendant on storage for Ludlow. The great question was, the court said, whether such parol testimony was admissible; and they held it was not. Judgment was given for the plaintiff. They said that, as between the defendant and Ludlow, the writing must be taken to be conclusive evidence of the fact. The case seems to me to have been put upon the rule of evidence referred to, and not upon the effect of an estoppel, though the judge who delivered the opinion did say that the defendant was estopped to deny that he had these goods. What renders it certain, however, that the judgment was put upon the rule of evidence that the writing could not be contradicted, is that it was considered that Ludlow himself might have brought the action. He certainly could have done so if the plaintiff could maintain it, for there was no communication between him and the defendants. Besides, they parted with nothing as the consideration of Ludlow's assignment, and obviously stood only in his place. As between Ludlow and the defendants, there was no pretense of any estoppel, except such a one as the rule of evidence referred to always creates. There is a case of *Harding v. Carter*, reported in *Park on Insurance*, 4, which seems to be more in point, and if good law, would change the opinion to which I am inclined. The defendants, insurance brokers, wrote to the plaintiff that they had effected two policies of insurance on his interest in certain property, which they had not done, the letter having been written by mistake by a clerk. Lord Mansfield held the defendants as insurers, and allowed the plaintiff to recover the value of the policies in an action of trover. It seems right enough to hold the defendants in such a case liable as insurers, if the plaintiffs had acted on the letter; but I do not so well understand how they could be charged for converting two policies, which the plaintiffs' evidence showed never had an existence. Unless the case is distinguishable from the general one by considerations connected with the law of insurance, I should be disposed to consider it overruled by *Austen v. Craven*, 4 Taunt. 644. It is at best only a *nisi prius* case, and has not found its way into any regular series of reports.

For these reasons, I am in favor of affirming the order appealed from.

DAVIES and WRIGHT, JJ., also dissented.

Order reversed, and judgment for the plaintiff.

WHERE AUTHORITY OF AGENT OR PARTNER DEPENDS UPON SOME FACT outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact. This is the rule, in effect, laid down in *North River Bank v. Aymar*, 3 Hill, 262, and followed in the principal case; and the same rule is recognized in citations of the principal case in *Dabney v. Stevens*, 10 Abb. Pr., N. S., 50; S. C., 40 How. Pr. 351, and 1 Sweeny, 430; *Marsh v. Gilbert*, 4 Thomp. & C. 262; S. C., 2 Hun, 61; *Exchange Bank v. Monteath*, 26 N. Y. 511; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 Id. 65; *President etc. v. Cornen*, 37 Id. 322; *Chemung Canal Bank v. Bradner*, 44 Id. 687; *Armour v. Michigan Cent. R. R. Co.*, 65 Id. 122; *Weeks v. Fox*, 3 Thomp. & C. 357. A firm is bound by the fraud of one partner in the course of the partnership business, though the other partners are innocent of any participation in the fraud: *Chester v. Dickerson*, 45 How. Pr. 336; S. C., 54 N. Y. 11; *Babcock v. Libbey*, 53 How. Pr. 259; *Durst v. Burton*, 2 Lana. 143; S. C., 47 N. Y. 174; *Coleman v. Pearce*, 30 Minn. 130, 131. But wrongs to render the principal liable must be expressly in the course of the latter's business: *Mali v. Lord*, 39 N. Y. 383. So long as the principal retains the benefit of a wrong by his agent, he is liable for the consequences: *Stewart v. Strasburger*, 51 How. Pr. 400; *Sherman v. Smith*, 42 Id. 199; *National L. I. Co. v. Misch*, 5 Thomp. & C. 549. All of the above cite the principal case.

EADIE v. SLIMMON.

[36 NEW YORK, 2.]

DURESS AS BETWEEN PARTIES OCCUPYING NO RELATION OF CONFIDENCE, or of control by reason of position, employment, or undue influence, can rarely be imputed, without showing some degree of fear or threats, involving in some degree a species of fraud. But when these latter elements enter into it, courts of equity have long been accustomed to grant relief.

DURESS—ASSIGNMENT PROCURED FROM WOMAN by threatening to arrest her husband and prosecute him, in case she refused to execute it, is void, as such threats amount to undue influence.

WHERE WOMAN'S FEARS ARE SO WROUGHT UPON THAT SHE EXECUTES AGREEMENT TO MAKE ASSIGNMENT, and several hours after executes the assignment, she will be considered as still acting under the same influence, apprehensions, and fears as influenced her in making the first agreement.

INSURANCE POLICY UPON LIFE OF HUSBAND FOR BENEFIT OF HIS WIFE, taken out under the act of 1840, cannot be assigned so as to destroy the rights of the wife.

ACTION to recover two thousand dollars, the amount of a policy of insurance upon the life of plaintiff's husband. The contest was between Mrs. Eadie and Slimmon, who claimed under an assignment from her. The insurers deposited the money in court. Mrs. Eadie claimed the assignment to be void, as having been obtained by coercion. At the trial, which was before Justice Scrugham, it appeared that on the night in question, Slimmon went to Eadie's house with an attorney, a police officer, and another person, and accused Eadie of embezzlement, alleged to have been committed while Eadie was in his employ as a clerk. The result of this meeting appears from the opinion. Judgment was given for plaintiff, but upon appeal to the supreme court at general term the judgment was reversed. Plaintiff then appealed to this court.

Campbell, for the appellant.

Harrison and Waring, for the respondent.

By Court, SMITH, J. As between parties occupying no relation of confidence in or towards each other, or of control, by reason of position, employment, or otherwise, undue influence can rarely be imputed without showing some degree of fear, or threats, or advantage taken of position, or unfair practices, or persuasion, involving in some degree a species of fraud. But when any of these elements enter into and constitute part of the circumstances attending a transaction, and controlling the will of a party making a deed or other contract, courts of equity have long been accustomed to give relief.

Judge Story states the rule, as extracted from and confirmed by many cases, as follows: Courts of equity, he says, relieve a party "when he does an act or makes a contract when he is under the influence of extreme terror, or of apprehension short of duress; for in cases of this sort he has no free will, but stands in *vinculis*": 2 Story's Eq. Jur., sec. 239. Circumstances, he says, of extreme necessity or distress of a party, although not accompanied by any direct duress or restraint, may also overcome free agency, and justify the court in setting aside the contract on account of some attending oppression, fraudulent advantage, or imposition.

The civil law, from which in a large degree we derive the principles which control courts of equity, always sets aside a contract procured by force or fear, or want of liberty in regard to it: Digest, lib. 4, tit. 2, sec. 1. But it was said the party must be intimidated by the apprehension of some serious evil

of a present or pressing nature, and such as is capable of making an impression upon a person of courage. But Pothier thinks this rule too strict, and that "regard should be had to the age, sex, and condition of the parties," and that "a fear which would not be deemed sufficient to have influenced a man in the prime of life and of a military character, might be sufficient in respect to a woman or a man in the decline of life": Pothier on Obligations, Evans, p. 16, art. 3, secs. 2, 25.

The rules in regard to the doctrine of undue influence have been asserted in numerous cases in our own courts: *Whelan v. Whelan*, 8 Cow. 537; *Sears v. Shafer*, 1 Barb. 408; S. C., 6 N. Y. 272; *Howell v. Ransom*, 11 Paige, 538; *Ellis v. Messervie*, Id. 467; *Evans v. Ellis*, 5 Denio, 640.

Within the principle asserted in these cases, the present case presents, I think, an instance of a contract procured by undue influence, if one ever existed. The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism, and coercion which overcame free agency, in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint. Mr. White, the plaintiff's brother-in-law, called at Eadie's on his return from an evening meeting, and there found the defendant and his counsel, a police officer, and another man. This, I should presume, from the season of year (April 4th), could not have been later than nine o'clock. How long these persons had been there at that time does not appear. The defendant and his counsel were in an upper room, and the officer and the man with him in the parlor below. The witness was requested by Mrs. Eadie to go into the drawing-room where the defendant was, who was talking very loudly and had some difficulty with her husband.

The witness immediately was informed what the difficulty was. The defendant insisted that Eadie should make over to him his house, and that an assignment of this policy should also be made. "Eadie refused. Slimmon told him that if he did not, as sure as the sun rose to-morrow he would lodge him in yonder jail; he had an officer down stairs for that purpose." The plaintiff was sent for and came in immediately. The matter was talked over and much discussion ensued. Mr. Eadie refused to make an assignment of the policy. Slimmon then renewed his threats to arrest Eadie if the

policy was not assigned. Mrs. Eadie became much excited, and appeared about to go into hysterics. In the course of the conversation, the plaintiff said to the defendant: "Mr. Slimmon, surely you won't take away my husband." He said, "he was sorry that he was compelled to do it." Finally this woman consented, and about three o'clock the next morning the memorandum of agreement to assign the policy and settle the matter was executed by her and her husband. After about six hours of continuous altercation and angry discussion between Eadie and Slimmon, of excitement and distress on the part of the plaintiff, the defendant had accomplished his purpose. Through this period of time, the fears and sensibilities of this woman were worked upon by threats of a criminal prosecution which should consign her husband to prison, involving great mortification, shame, distress, and ruin to herself and family, and the wife finally yields to the demands of her husband's creditor.

I can imagine no duress over a man—no constraint over his person, or dread of personal injury—more likely to deprive him of free agency, and induce him to yield to the wishes and demands of another, than the duress over this woman, operating through appeals thus addressed to her pride, her fears, her affections, and her sensibilities. A deed executed at such a time, under such circumstances, should be deemed obtained by undue influence, and ought not to stand.

It is conceded in the opinion of the learned judge in the court below that this must be so if the transaction had been terminated at this interview; but it was held that, inasmuch as the assignment was not then executed, time was given for the plaintiff to become tranquil and act freely, and that the final assignment was not executed till after the lapse of sufficient time for that purpose. The formal assignment was executed about one o'clock the next day; but can there be any doubt that when it was so executed the plaintiff was still acting under the influence of the same apprehensions and fears which led her to consent to make the assignment during the night before? But she had in fact made a written assignment, valid in law, if the policy was assignable by her, if she had made no other. The assignment executed the next day was a mere formality. She was applied to by the same counsel for the defendant, who had been present during the previous night, and was familiar with all that then occurred; and having consented to transfer the policy, and being thus committed

to complete the assignment, she obviously knew not how to avoid it, or otherwise, to escape from the strait in which she was placed. I think the execution of the formal assignment then made should be deemed part and parcel of the original transaction, and to be governed by the same influences and considerations which controlled her signature of the memorandum a few hours before. The threats of the arrest and imprisonment of her husband were still fresh in her mind, and the same apprehensions for his sake and her own, of shame, mortification, and ruin, still stared her in the face. Another consideration, I think, should exert some influence in the decision of this question. Either the accusation which the defendant brought against Eadie was entirely unfounded, or he was seeking to compromise a criminal offense. If he knew that a crime had been committed by Eadie, he had no right to compromise it in this way, and the securities obtained upon such compromise were received as a consideration for compromising a felony, and for that reason were invalid; else the whole of his assertions and threats on the subject were a gross imposture. A majority of my brethren also think that the policy of insurance was not assignable by Mrs. Eadie. The policy was issued and taken under the act of 1840 entitled "An act in respect to insurance of lives for the benefit of married women." We think the intent of the statute was to make these policies a security to the family of any married man, and a provision for their use and benefit, and that this intent would be defeated if they were held to be assignable by the wife like ordinary choses in action belonging to her in her own right as her separate property.

The judgment of the general term should, therefore, be reversed, and that of the special term affirmed, with costs.

At a later term of the court, a motion for a reargument was made, which was denied. Denio, C. J., delivered an opinion in which he dwelt particularly upon the non-assignability of the insurance policy. In concluding his opinion, he says: "By the common law, a person could insure his own life for any sum for which he might choose to pay the premium, and which the insurers would engage to insure; but if one desired to insure the life of another, he could only insure the interest which he had in such other life. If he undertook to insure a gross sum, and the contract was not susceptible of a construction which would limit the recovery to the actual damages sustained, the contract would be void under the statutes against betting and gaming. This principle the legislature, by the act of 1840 (Laws, p. 59), relaxed in respect to insurance as effected by a married woman, for any sum which she and the insurance company might see fit to contract for. It was provided that, in the case of her surviving her husband, the amount payable by the terms of

the policy should be payable to her for her own use, free from all claims of the representatives of her husband or of his creditors. There is another feature in the act which shows that it was an enabling, and not a declaratory, provision. By the general rules of law, a policy on the life of one sustaining only a domestic relationship to the insured would become inoperative by the death of such insured in the lifetime of *cestui que vie*; or if it could be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured; but by this act the contract may be continued in favor of the children of the insured wife after her death. These features distinguish this case from that of an ordinary chose in action belonging to a married woman as her separate estate. The provision is special and peculiar, and looks to a provision for a state of widowhood, and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy as though it were realized personal property, or an ordinary security for money."

DURESS AND UNDUE INFLUENCE AS DEFENSE TO BOND, executed by a father for the debts of his son, is not made out by proof that the obligee falsely represented to the father that unless the bond was executed the creditors would indict the son for obtaining goods under false pretenses, and send them to the penitentiary, and that the father was nearly sixty-six years old, and had a mind easily influenced and excited: *Fulton v. Hood*, 75 Am. Dec. 664. In the note to this case, numerous authorities upon the question of duress are collected: See also *Anonymous*, 73 Id. 461.

THE PRINCIPAL CASE IS CITED to the point that when a party is arrested without just cause, and from motives which the law does not sanction, any contract into which he might enter with the authors of the wrong to procure his liberation from restraint, is imputed to illegal duress. It is corrupt in its origin, and the wrong-doer can take no benefit from its execution, in *Osborne v. Robbins*, 4 Abb. Pr. 21; S. C., 36 N. Y. 371. Whenever one party is so situated as to exercise a controlling influence over the will, conduct, and interests of another, contracts then made will be set aside, even upon slight evidence of the improper exercise of such influence. To this point the principal case is cited in *Ingersoll v. Roe*, 65 Barb. 346-357; *Jones v. Diederick*, 3 Daly, 177. The principal case is cited in *Peyser v. Mayor*, 70 N. Y. 501, as being an example of duress of person; and in *Haynes v. Rudd*, 30 Hun, 237, to the point that where plaintiff's son was about to be arrested for embezzlement, and defendant wanted a note for the amount alleged to have been embezzled, and attempted to influence the action of the plaintiff by operating upon his family pride, his fear of disgrace, and his desire to save his son from the ruinous effects of a prosecution, and thereby induced him to execute the note, it is void for duress. It is cited in *Fisher v. Bishop*, 36 Id. 112, *Schoener v. Lissauer*, Id. 100, and *Lefebvre v. Dutruit*, 51 Wis. 326, to much the same point. In *Rexford v. Rexford*, 7 Lana. 6, a distinction is drawn between cases where duress is practiced toward a woman by a stranger, and where the duress is of her husband. The court say that in the latter case the evidence of duress must be strong and clear. The principal case is again cited as being one of several cases, of high authority, which adopt the liberal rule that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because in such a case there is nothing but the form of the contract without the substance, in *United States v. Huckabee*, 16 Wall. 432; *French v. Shoemaker*, 14 Id. 332; *Brown v. Pierce*, 7 Id. 216.

Upon the insurance question discussed in the principal case, it has obtained wide notoriety, having been cited in all the cases cited below, to the point that a policy of insurance, procured by a married woman upon the life of her husband, under the statute of 1840, for her benefit, and in case of her death before her husband, for the benefit of her children, was not assignable by the wife during the lifetime of her husband: *Franks v. Mut. Life Ins. Co. of N. Y.*, 102 N. Y. 266-274; *Whithead v. N. Y. Life Ins. Co.*, 38 Hun, 425; *Je Jonge v. Goldsmith*, 46 N. Y. 131; *Fowler v. Butterly*, 44 Id. 157; *Smilie v. Quinn*, 90 Id. 496; *Baron v. Brummer*, 100 Id. 374; *Bolt v. Keyhoe*, 30 Hun, 622; *Wilson v. Lawrence*, 76 N. Y. 585; *Barry v. Equitable Life Assurance Society*, 59 Id. 593; *Wilson v. Lawrence*, 13 Hun, 241; *Barry v. Brune*, 8 Id. 400; *Ainsworth v. Backus*, 5 Id. 414; *Brummer v. Cohen*, 58 How. Pr. 241; S. C., 57 Id. 386; *Fowler v. Butterly*, 53 Id. 475; *Lockwood v. Bishop*, 51 Id. 225; *Duriam v. Central Verein of the Hermanns Soekams*, 7 Daly, 171; *Barry v. Equitable L. A. S.*, 2 Abb. Pr. 385, note.

THE PRINCIPAL CASE WAS CITED AND DISTINGUISHED in *Barroughs v. State Mut. Life Assurance Co.*, 97 Mass. 359; *Goodrich v. Treat*, 3 Col. 408; and in *Foster v. Gile*, 50 Wis. 603. It is also distinguished in *Kerman v. Howard*, 23 Id. 108, where the court decide that where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit, and himself paid the premiums thereon, he may dispose of it by will or otherwise.

ALDEN v. NEW YORK CENTRAL R. R. Co.

[26 NEW YORK, 102.]

COMMON CARRIER OF PASSENGERS, LIABILITY FOR DEFECTIVE AXLE.—Common carriers of passengers must be held accountable, in every event, to furnish roadworthy coaches. They will be held responsible for damages caused by a cracked axle, although the defect could not possibly have been discovered by any available means.

ACTION for damages. Upon the trial, it appeared that one of the axles of defendant's car was cracked, and broke, whereby plaintiff was injured. The defect was a small old crack in the axle so covered by the wheel that it could not possibly be discovered without taking the wheel off, and that the wheel could not be replaced without a power of twenty-five or thirty tons. Expert witnesses testified that there was no way of discovering the defect without destroying the axle. A verdict for the plaintiff was affirmed at the general term, and defendant appealed.

Curtenius, for the appellant.

Rogers, for the respondent.

By Court, GOULD, J. In regard to what has been called the negligence of railroad companies in not providing safe axles for their cars, the only case in our own courts, which professes

to fix any rule, is that of *Hegeman v. Western R. R. Corp.*, 13 N. Y. 9 [64 Am. Dec. 517]. The result of that case held, in substance, that the company was responsible, both for the manufacturer's possessing the requisite skill, and for his actual exercise of that skill, in each particular axle,—the judgment in that case being against the company for negligence, in not having discovered a flaw in the axle, which could not have been discovered by any known trial after the axle came into the company's possession, but which might have been discovered by a process of bending, before it left the hands of the manufacturer.

But in that case the charge to the jury, at the circuit, held that "in making the careful examination required by law, before the train started, the company was not guilty of negligence, if it made all the examination which human skill and foresight could make without taking the machinery to pieces." And in this court, the prevailing opinion says the company "is bound to use all precautions, as far as human care and foresight will go, for the safety of the passengers."

In the case before us, so far as the defect in the axle (the hidden crack) is concerned, it is clearly, and without any contradiction, proven that it was absolutely out of the reach of discovery by any practicable examination of the axle, unless by taking off the wheel, with great difficulty and labor; that is, "taking the machinery to pieces." Tried by the *Hegeman* case (*Hegeman v. Western R. R. Corp.*, 13 N. Y. 9 [64 Am. Dec. 517]), it would seem that this defendant could not be responsible for an injury caused, as the one sued for seems to have been, by that defect; as it is positively testified "that it would not be safe to run at all an axle cracked as this was" found to have been on examination after the accident.

There has, however, always been something unsatisfactory in the decision of the *Hegeman* case, arising from the difficulty in finding anything to call negligence in the acts of the company as there proved; and we can probably place the result of that case on a surer and more satisfactory ground, as well as fix a test of much easier application, by referring to another case. In *Sharp v. Grey*, 9 Bing. 457, S. C., 2 Moore & S. 621, the proprietor of a stage-coach was sued for injuring a passenger by the overturning of his coach from the breaking of an axle. The axle was of iron, secured and strengthened by parallel wooden strips screwed on and around it; and before starting it was carefully examined, and showed

no flaw. After the accident it was examined, and it then appeared that it had been cracked for some time, but the crack was in such a place that it was not possible for any strictness of examination to find it, without taking off the wooden strips, the frequent taking off of which would have injured the axle, and rendered it less safe than it would be if those pieces of wood were left undisturbed.

Yet in that case a verdict of five hundred pounds was rendered against the defendant, and the court in bank refused to set it aside; holding unanimously (not that the defendant was guilty of any negligence, but) that he must be held accountable, in every event, to furnish a roadworthy coach; and that, if the event proved it not to have been so, he must suffer the consequences. And though this may seem a hard rule, it is probably the best that can be laid down; since it is plain and of easy application, and when once established, is distinct notice to all parties of their duties and liabilities. And practically, it will be likely to work no more burdensome results to carriers of passengers than to leave them, with an uncertain criterion of responsibility, to the trouble and expense of strongly litigated contests before juries.

The judgment of the supreme court should be affirmed, notwithstanding there may, in strictness, have been an error in the refusal to charge (as requested), that the defendant was not bound to take off the wheel and examine the axle; since by the rule now laid down, so charging would be entirely immaterial to the result.

All the judges concurred.

Judgment affirmed.

COMMON CARRIERS OF PASSENGERS are required to do all that human care, vigilance, and foresight reasonably can, under the circumstances, and in view of the character and mode of conveyance adopted, to guard against accidents and injuries to passengers: *Tuller v. Talbot*, 76 Am. Dec. 695, and cases in note. A railroad company is bound to transport safely, or to respond in damages, except when the injury has resulted from the act of God, or the concurring negligence of the party complaining: *Powell v. Pennsylvania R. R. Co.*, 75 Id. 564.

RAILROAD COMPANY IS LIABLE for injury sustained by passenger in consequence of the breaking of an axle, attributable to a defect in the material of which it was made, notwithstanding the defect was latent, and could not have been discovered by ordinary inspection, if it could have been ascertained by any tests known to manufacturers of such articles: *Hegeman v. Western Railroad Corporation*, 64 Am. Dec. 517, and very extensive note exhaustively discussing the question. See also *Curtis v. Rochester and Syracuse R. R. Co.*, 75

Am. Dec. 258. The principal case is cited in *McPadden v. N. Y. Cent. R. R. Co.*, 47 Barb. 247, to the point that it is now the settled law that a common carrier of passengers is bound to furnish roadworthy vehicles, irrespective of any question of negligence. In *Robbins v. Mount*, 33 How. Pr. 37, citing our case, the court says that "the rule is strict that the carrier warrants the passengers that his vehicle is equal to the journey, and he is bound, absolutely and irrespective of negligence, to provide roadworthy vehicles." In *Warner v. Erie R'y Co.*, 49 Barb. 569, in distinguishing between the case of a servant in the employ of the carrier, and a passenger on his train, the court say: "If the intestate had been a passenger in the cars which fell through the bridge in question, no doubt would have existed as to the defendants' liability, for the defendants, as common carriers, in such case, must be held to guarantee the soundness and safety of their vehicles, their bridges, roadway, and machinery," and they cite the principal case. It is again cited in *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 283, where the court discuss kindred questions with the above. It is cited *arguendo*, in *Hasman v. Hoboken L. & I. Co.*, 2 Daly, 130, where the court attribute negligence to a ferryman for not providing safe and effective means of egress from his boat.

In the case of *McPadden v. New York Cent. R. R. Co.*, 44 N. Y. 490, which is a review of the case of that title above cited from 47 Barbour, the principal case is commented on at length. In conclusion, Earle, C., says: "I have thus commented upon and alluded to the case of *Alden v. New York Cent. R. R. Co.*, with no design to repudiate it as authority, but for the purpose of claiming that it is a decision which should not be extended. I am unwilling to apply it to every case that apparently comes within its principle; nor would I limit it to the car in which the passenger was riding. The whole train must be regarded as the vehicle, and the engine and all the cars attached together must be free from defect and roadworthy, irrespective of negligence." The court then refuse to extend its doctrine to an accident occasioned by a broken rail. Our case is again cited in *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 138, where the court say: "That a carrier of passengers is not an insurer of their safety, was explicitly held in *Christian v. Gregg*, 2 Camp. 79, and has since been settled doctrine of the law. Some remarks, which seem adverse to this view, were made by the learned judge who delivered the opinion in *Alden v. New York Cent. R. R. Co.*, but the subsequent cases show that it was not the intention of the court to depart from the established doctrine upon the subject."

LAZIER v. WESTCOTT.

[26 NEW YORK, 146.]

FOREIGN COUNTRY — AUTHENTICATION OF JUDGMENT. — Our statute providing for the admission of duly authenticated judgments of foreign countries does not relate alone to the independent powers of the world. Its obvious meaning is to admit the records of any court of any foreign country; it is immaterial whether such foreign country is one of the great powers of the world, or one of minor importance.

FOREIGN COUNTRY — JUDICIAL NOTICE. — Courts will take judicial notice that the province of Upper Canada is a foreign country; that it forms no part of our own; that it has a government and courts; and that these courts proceed according to the course of the common law.

RECORD OF JUDGMENT OF COURT OF PROVINCE OF UPPER CANADA is duly authenticated by attestation of the clerk of the court, with the seal of the court annexed, to which is attached the proper certificates of the chief justice of the court, of the assistant secretary of state of the province, and of the governor in chief of said province, to which is affixed the great seal of the province.

ERASURES AND INTERLINEATIONS APPEARING UPON FACE OF EXEMPLIFICATION OF RECORD OF JUDGMENT of a foreign country, if they are verified by the initials of the clerk of the court, will be presumed to have been made by him at the time he authenticated the roll, and are immaterial.

VARIANCE BETWEEN ALLEGATIONS AND PROOF, AS TO DATE ON WHICH JUDGMENT WAS RECOVERED, is immaterial, if it does not mislead the defendant. If he was misled, he could have had the pleading amended, or the supreme court could make the amendment; and on appeal, this court will assume the amendment to have been made.

FOREIGN JUDGMENT CONCLUSIVE. — Judgment of a court of a foreign country, duly proven, is conclusive between the parties, where there has been a trial upon the merits, and there has been no fraud or want of jurisdiction, or mistake shown or offered to be shown. It only remains competent for the defendant to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained.

THE opinion states the case.

Starbuck, for the appellant.

Mercin, for the respondent.

By Court, DAVIES, J. This is an action upon a judgment recovered in the court of common pleas of Upper Canada against this defendant by this plaintiff. The cause was tried before a referee, who gave judgment for the plaintiff and judgment on his report to be affirmed at general term.

On the trial, the plaintiff offered in evidence an exemplification of the record of a judgment in the court of common pleas of Upper Canada, which was received under objection and exception. Numerous interlineations, alterations, and erasures appeared in the record, but they all appeared to be marked or authenticated by the initials "L. H.," being the initials of the name of the clerk, and said initials appeared to be in the same handwriting as that of the signature of said clerk. The defendant's counsel objected to the introduction of said papers on the ground: 1. That this government does not recognize the province named in the record as one of the independent powers of the world, and that it was not such in fact; and that the evidence of the authority of the officers acting must come from the government creating them; 2. That the paper is not authenticated in the manner required

by law; 3. It is nowhere certified to have been compared with the original, and to be a true transcript, etc., as required by law; 4. It bears evidence upon its face of numerous erasures, alterations, and interlineations, and it is averred that they all appear to have been made since its authentication; 5. The facts sought to be proved by the paper offered can be proved only by such testimony as is recognized and received in the courts of common law; 6. If the record shows anything, it is the recovery of a judgment November 19, 1855, whereas the complaint counts on a judgment rendered September 28, 1856, and the variance is fatal. These objections were overruled, and the defendant excepted.

I shall consider them in the order above enumerated. I do not read our statute, in reference to the exemplification of the records and judicial proceedings in any court in any foreign country, as confining the admission of the records-only of such foreign country as shall have been acknowledged by this government as one of the independent powers of the world, and with which we have diplomatic intercourse. I think the obvious meaning of the statute is to admit the records of any court of any foreign country, and it is quite immaterial whether such foreign country is one of the great powers of the world, or one of minor importance, and having a circumscribed extent. The size of the country cannot alter the rule of evidence, and the records of a court of the republic of San Marino are of equal validity as those of the empire of all the Russias. The only question is, Does the record come from a court of a foreign country? If so, and it is properly authenticated, it is to be admitted as evidence under the provisions of our revised statutes: 3 R. S., 5th ed., p. 678, sec. 26. The court will take judicial notice that the province of Upper Canada is a foreign country, and forms no part of our own: *Ennis v. Smith*, 14 How. 430; that it has a government and courts, and that those courts proceed according to the course of the common law. The record produced was therefore the record of a court of a foreign country, and it is authenticated by the attestation of the clerk of the court, with the seal of the court annexed. There is also attached the certificate of the chief justice of the court, that the person attesting such record is the clerk of the court, and that the signature of such clerk is genuine. These papers are further authenticated by the certificate of the assistant secretary of state of said province, and by the governor in chief of said province, having charge of the

great seal of said province, and which fact is attested by the affixing the great seal to said certificate, and which of itself imports verity, under the authority of which government said court is held, and which certificate declares that such court is lawfully and duly constituted, and specifies the general nature of its jurisdiction, and it also verifies the signature of the clerk of such court, and the signature of the chief justice thereof. It seems to me, therefore, that all the provisions of the statute have been complied with, to authorize the reading of this record in evidence in any court of this state. The referee, therefore, properly admitted it to be read. If I am correct in these views, they dispose of the first and second objections of the defendant's counsel.

The third objection is based upon the assumption that it was offered in evidence as a copy of the record of a court of a foreign country, under section 27, 3 R. S., 5th ed., 678. This is a mistake. It was an exemplification of such record under the twenty-sixth section, and offered and received and authenticated as such. The provisions of section 27 had therefore no application to the case, and were properly disregarded. The assumption in the fourth objection that it appears by the record that the erasures, alterations, and interlineations made therein were made since its authentication, is not sustained by any proof in the case, and certainly not from anything which I have been able to discover as appearing on the face of the record. Those alterations seem to be verified by the initials of the clerk, and it is to be presumed they were made by him at the time he authenticated the roll. In reference to the acts of such officers, the maxim of *omne rite esse acta* is to be applied, and fraud and falsehood are not to be assumed without some evidence to warrant the assumption. There is nothing on the face of these alterations which would lead any one to doubt but that they were made in good faith and in accordance with the truth by the proper officer, and at the appropriate time. The fifth objection is answered by the provisions of the statute. They declare that a record thus authenticated may be admitted as evidence, and when so admitted, it becomes legal evidence of the facts set forth in the record. The legal effect of such evidence will be hereafter considered.

The sixth objection is wholly groundless. The exemplification states that the enrollment of the judgment was on the twenty-sixth day of September, 1856, in the court of common

pleas, and at the foot of the judgment roll it appears to have been signed on that day. It was properly, therefore, averred in the complaint that the judgment was recovered on that day in that court, and there was not, therefore, any variance between the day laid in the complaint or that upon which it was recovered and that appearing by the record itself. The variance between the allegation and the pleading, if it had been of the character assumed by the objection, could not have been material, and it could not have misled the defendant, and might have been disregarded. If the party had been misled, he could have satisfied the court thereof, and then the pleading could have been amended in conformity with section 169 of the code. But it was competent for the supreme court at any time, under section 173, to have amended the pleading by making it conform to the facts proven, when in this instance it was but correcting a mistake in a date, and this court on appeal will assume the amendment to have been made. There is nothing in this objection in any point of view in which it may be regarded.

There remains to be considered the question whether the judgment in the court of a foreign country, duly proven, is conclusive between the parties, when there has been a trial upon the merits, and there is no fraud or want of jurisdiction, or mistake shown, or offered to be shown. In other words, whether the merits of the case are to be retried in another tribunal in another action between the same parties.

Section 28 of volume 3 of the Revised Statutes, 5th ed., 678, declares that the provisions of sections 26 and 27, in reference to the manner of proving judgments recovered in the courts of foreign countries, shall not be construed as declaring the effect of any record or judicial proceeding authenticated as therein prescribed. Much discussion, and not a little contrariety of decision, has obtained in England and in this country as to the conclusiveness of a judgment obtained in a foreign country, when sued upon in the courts of England or of this country. The rule may now be regarded as firmly settled in England that the judgment is conclusive, so far as to preclude a retrial upon the merits. It remains competent for the defendant to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained: *Henderson v. Henderson*, 6 Q. B. 288; *Ferguson v. Mahon*, 11 Ad. & E. 179; *Ricardo v. Garcias*, 12 Clark & F. 368; *Bank of Australasia v. Nias*, 4 Eng. L. & Eq. 252.

The same rule was early enunciated in this state by Chief Justice Kent, in *Taylor v. Bryden*, 8 Johns. 173. He there says: "To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a new trial in every case, and upon every question of fact. Suppose a recovery in another state or in any foreign court in an action for a tort, as for an assault and battery, false imprisonment, slander, etc., and the defendant was duly summoned and appeared, and made his defense, and the trial was conducted orderly and impartially, according to the rules of a civilized jurisprudence, is every such case to be tried again here upon the merits? I much doubt whether the rule can ever go to this length. The general language of the books is, that the defendant must impeach the judgment by showing affirmatively that it was unjust, by being irregularly or unfairly procured."

In *Monroe v. Douglas*, 4 Sand. Ch. 126, a very elaborate and learned review is taken of the cases as to the conclusiveness in our courts of the judgments of the courts of other countries, and it is declared by that learned and eminent judge, Vice-Chancellor Sandford, that when the foreign judgment is produced in evidence and appears to be regular in form, and to contain the essential facts of an adjudication of the controversy made between proper parties, the burden of showing its invalidity rests upon the party who desires to impeach it, and he can only show, in contesting its validity, that it was procured by fraud, or that it is void on its face, or void by the local law, *fori rei judicatæ*. Mr. Justice Story reasons strongly in favor of the doctrine of the absolute conclusiveness of foreign judgments (*Conflict of Laws*, sec. 607), and holds that this is the more convenient and the safest rule and the more consistent with sound principle, except in cases in which the court which pronounced the judgment had not due jurisdiction of the case and of the defendant, or the proceeding was in fraud, or founded in palpable mistake or irregularity, or bad by the law of *rei judicatæ*; in all such cases he says, the justice of the judgment ought to be impeached.

In *Cummings v. Banks*, 2 Barb. 602, Edwards, J., in delivering the opinion of the court, says his inclination is to side with Judge Story; and Vice-Chancellor Shadwell, in *Martin*

v. *Nicolls*, 8 Sim. 458, and indeed the English courts generally, hold the foreign judgment conclusive, except, of course, for fraud, mistake, or want of jurisdiction, and he thinks that the better opinion in this country as well as in England. The same doctrine has been laid down by the supreme court of Ohio in the case of *Silver Lake Bank v. Harding*, 5 Ohio, 545. But in Vermont the rule has been stated as contended for by the defendant's counsel. There Chipman, C. J., in *King v. Van Gilder*, 1 Chip. D. 59, held that if the defendant in an action on a foreign judgment produced evidence to raise a presumption that the plaintiff's original claim was groundless, this will put the plaintiff to prove his demand *de novo*, and the trial would then be had as if no judgment had been previously rendered. I find no authority for such a doctrine in this state, and it seems to me to be in hostility to our own cases, and the better rule as enunciated by able text-writers and learned judges.

The views suggested by Judge Story seem to be eminently correct, and most in harmony with sound principle and the best considered cases. He very truly says that it would be difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the case anew in a suit upon the foreign judgment. He inquires, "In a case of covenant or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence, and principles of justice, is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed *ex æquo et bono*? Or is it to administer strict law and stand to the doctrines of local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject." Holding that the judgment was only to be regarded as *prima facie* evidence for the plaintiff, he correctly says would be a mere delusion if the defendant might still question it by opening all or any of the original merits on his side, for under such circumstances it would be equivalent to granting a new trial. He concedes that the defendant ought to be permitted to show that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or upon its face it was founded in mistake, or that it is irregular and

bad by the local law. Beyond this, he insists, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and compel the plaintiff to establish again those merits and his rights to a recovery.

At the last term of this court in the case of *Rocco v. Hackett* [not reported, but reported below in 2 Bosw. 579], we held a judgment recovered in Massachusetts, when the court there had acquired by the laws of that state jurisdiction of the party, in a suit upon that judgment in the courts of this state, conclusive upon the parties, and that the merits of the controversy could not be retried here in such action. We think the rule adopted in England, holding the same doctrines as to foreign judgments and recognized in this state, should be adopted and adhered to here, in respect to such foreign judgments, and that the same principles and decisions which we have made, as to judgments from the courts of other states of the Union, should be applied to foreign judgments. The judgment should therefore be affirmed, with costs.

All the judges concurred.

Judgment affirmed.

THE PRINCIPAL CASE IS CITED in *Brinkley v. Brinkley*, 50 N. Y. 202, to the point that it is the rule that the definitive judgment of a court of another state, between the same parties, upon the same cause of action, upon the merits of the case, is conclusive; but it must be a definitive judgment on the merits only. It is also cited in *Mandeville v. Reynolds*, 68 Id. 534, to the point that it is a presumption of law that no official person, acting under oath of office, will do aught which it is against his official duty to do, or will omit to do aught which his official duty requires to be done.

AUTHENTICATION OF FOREIGN JUDGMENT. — According to Mr. Freeman, foreign judgments are properly authenticated: "1. By an exemplification under the great seal; 2. By a copy proved to be a true copy; 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated": Freeman on Judgments, sec. 414. However, in the absence of either of these means, other testimony will be received of an inferior character. For example, the affidavit of a person that he applied to the clerk of the foreign court for a copy of the judgment, that he assisted the clerk in comparing the copy with the record and in affixing the seal of the court to the copy, and saw the clerk attest it with his signature, is a sufficient authentication of the judgment: *Buttrick v. Allen*, 8 Mass. 272; S. C., 5 Am. Dec. 105. A foreign judgment is sufficiently authenticated in Michigan when it is signed by the clerk of the court, and attested by its seal, where it is admitted that the court had common-law jurisdiction of the subject-matter, and that the person signing the record is the clerk of the court: *Copling v. Herman*, 17 Mich. 524. A judgment is sufficiently established when certified by the clerk having charge of the records of the court in which it was rendered, where his handwriting is proved, and it is

shown that the court had no seal; especially when it is shown that this is the usual method of authenticating their judgments when sent to be used as evidence in foreign countries: *Packard v. Hill*, 7 Cow. 434. Where, however, the clerk in authenticating a record stated in his certificate that he attached the seal of the district in which the court was held, and the seal upon its face showed itself to be of another district, the proof is bad: *Junkin v. Davis*, 6 U. C. C. P. 408; S. C., 22 U. C. Q. B. 369. Another authentication held defective was that in *Woodruff v. Walling*, 12 Id. 501, where the certificate was made by the county clerk, and the seal was the seal of the county. There was no evidence that this was the proper officer or the proper seal, and the court would not presume that the county clerk was the clerk of the court, and that the seal of the county was the seal of the court. Nor is an authentication by the certificate of a person who states himself to be secretary of foreign affairs in Portugal, under seal, sufficient: *Church v. Hubbard*, 2 Cranch, 187; see *Freeman on Judgments*, sec. 414.

FOREIGN JUDGMENTS — JURISDICTION MUST APPEAR.—At all times, in both England and America, where judgments of foreign tribunals have been sought to be enforced, the question whether such court had jurisdiction of the person of the defendant, at the time it rendered its decree, has always been considered a legitimate subject of inquiry. It is generally asserted by the courts that it is not a principle of the law of nations that one state is bound to enforce within its limits the judgments or decrees of another; nor are they enforced through the exercise of national "comity." The more sensible reason is that advanced by Baron Parke in *Williams v. Jones*, 13 Mees. & W. 633: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are enforced." It is certain that this obligation cannot spring from the mere fact that some court has assumed to render a judgment, but the proceedings anterior to the judgment must have been such as fairly imposed upon the party sued the obligation to appear and make his defense to the demand set up, if any he had; and if, under the circumstances, he was fairly entitled to treat any notice of the suit which may have been given him as unwarrantable, and to disregard it, then it seems plain that no obligation to recognize the conclusions of the court in the suit could possibly arise. It is consequently well settled that the courts will not entertain the judgment of a foreign tribunal, if it appears from the record, or is made to appear by other evidence, that the defendant therein has never been served with process according to the law of the place where the judgment was rendered, or that he was not a citizen of the foreign country at the time the decree was rendered against him, and had not submitted himself to the jurisdiction of the court: *Freeman on Judgments*, sec. 588; *Bischoff v. Wethered*, 9 Wall. 812; *McIlwain v. Zimmer*, 38 Mich. 765; *Rankin v. Goddard*, 54 Me. 28; S. C., 55 Id. 389; *Middlesex Bank v. Butman*, 29 Id. 19; *Bissell v. Briggs*, 9 Mass. 462; S. C., 6 Am. Dec. 88; *Burnham v. Webster*, 1 Wood. & M. 172; *De Brimont v. Penniman*, 10 Blatchf. 436; *Shepard v. Wright*, 35 Hun, 444; *Schibbey v. Westenholz*, L. R. 6 Q. B. 155; *Burn v. Bletcher*, 23 Id. 28; *Douglas v. Forrest*, 4 Bing. 686; *Cowan v. Braidwood*, 9 Dowl. 27; *Gauthier v. Blight*, 5 U. C. O. P. 122; *Valles v. Dumergue*, 4 Ex. 289; *Cheriot v. Foussat*, 3 Binn. 250; *Monroe v. Douglas*, 4 Sand. Ch. 178; *Buttrick v. Allen*, 8 Mass. 272; S. C., 5 Am. Dec. 105.

EFFECT OF FRAUD.—Another question which a court may inquire into when asked to enforce a foreign judgment is, Did fraud enter to any extent into its

procurement? When this question is answered in the affirmative, both the English and American courts refuse to entertain the judgment. A foreign judgment, tainted with fraud, will be disregarded: *Freeman on Judgments*, sec. 591; *Story's Conflict of Laws*, sec. 608; *Rankin v. Goddard*, 54 Me. 28; S. C., 55 Id. 389; *Henderson v. Henderson*, 6 Q. B. 288; *Reimers v. Druce*, 23 Brev. 145; *Price v. Deachurst*, 8 Sim. 279.

EFFECT OF FOREIGN JUDGMENT. — *In England.* — In England, it was formerly a much-discussed question whether foreign judgments should be given effect to as conclusive of the facts therein adjudicated, or whether they should be regarded as merely *prima facie* evidence on behalf of the plaintiff. The earlier cases favored the doctrine that foreign judgments should be regarded as only *prima facie*, but the tendency of the later cases has been towards the rule which holds them to be conclusive, and it seems to be now settled that where the judgment is still valid and in force in the country where rendered, — where the court had jurisdiction over the subject-matter and the parties, and that it is free from the imputation of having been fraudulently procured, it will be held conclusive as to the parties upon the facts adjudicated: *Freeman on Judgments*, sec. 594. The attitude of the English courts is very well exhibited in an Upper Canada case, where the court were considering whether to regard a foreign judgment as conclusive or only *prima facie*. The learned judge said: "It can scarcely be expected upon such a question, seeing such difference of opinion, that I can do more than give my adherence to one side or the other; and in doing so I adopt the language of Mr. Justice Story, who says: 'Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion if this defendant might still question it by opening all or any of the original merits on his side; for under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that upon its face it is founded in mistake, or that it is irregular and bad by the local law *fori rei judicatae*. To such an extent, this doctrine is intelligible and practicable; beyond this, the right to impugn the judgment is, in legal effect, the right to retry the merits of the original causes at large, and to put the defendant upon proving their merits': *Story's Conflict of Laws*, sec. 507"; *Warrener v. Kingsmill*, 8 U. C. Q. B. 407-425; sustaining these views are *Ferguson v. Mahon*, 11 Ad. & E. 179; *Henderson v. Henderson*, 6 Ad. & E., N. S., 288; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Bank of Australasia v. Harding*, 9 Com. B. 681; *De Coese Brissac v. Rathbone*, 6 Hurl. & N. 301; *Burn v. Bletcher*, 23 U. C. Q. B. 28.

In America. — The American courts have given to the judgments of foreign tribunals less consideration and effect than have the courts of England, and all their earlier decisions have been to the effect that the judgment of a foreign court is no more than *prima facie* evidence, and that in an action upon it the defendant has all the benefits he would be entitled to in an action upon the original cause. The following is a fair example of the language of such cases: "If the judgment be produced by a party to obtain the execution of it here, the question of the jurisdiction of the court rendering it is still open to inquiry. And if a defect of jurisdiction should appear, the party producing the judgment must fail without any inquiry into its merits. But if the foreign court rendering the judgment had jurisdiction of the cause, yet the courts here will not execute the judgment without first allowing an inquiry into its merits. The judgment of a foreign court, therefore, is by our laws considered only as

presumptive evidence of a debt, or as *prima facie* evidence of a sufficient consideration of a promise, where such court had jurisdiction of the cause; and if an action of debt be sued on any such judgment, *nil debet* is the general issue; or if it be made the consideration of a promise, the general issue is *non assumpsit*. On these issues, the defendant may impeach the justice of the judgment by evidence relative to that point": *Bissell v. Briggs*, 9 Mass. 463; S. C., 6 Am. Dec. 88. To the same effect, and equally as strong, are *Wood v. Gamble*, 11 Cush. 9; *Bartlett v. Knight*, 1 Mass. 400; *Buttrick v. Allen*, 8 Id. 273; S. C., 5 Am. Dec. 105; *Jordan v. Robinson*, 3 Shepl. 167; *Pelton v. Platner*, 13 Ohio, 209; *Burnham v. Wester*, 1 Wood. & M. 172; *Williams v. Preston*, 3 J. J. Marsh, 600; S. C., 20 Am. Dec. 179. Justice Story argues strongly against this proposition in his work on conflict of laws, section 607; and Justice Kent is equally pronounced in his opposition in *Taylor v. Boyden*, 8 Johns. 173. Mr. Freeman, in his work on judgments, section 597, says: "The considerations which have influenced the adjudications in the English courts will, no doubt, make themselves felt in America. No prediction in regard to future decisions is more likely to be realized than that our courts will, in time, place foreign judgments on the same footing which they now occupy in the mother country." These observations would seem to be justified by *Monroe v. Douglas*, 4 Sand. Ch. 126; *Rankin v. Goddard*, 54 Me. 28; S. C., 55 Id. 389; *Low v. Muesy*, 41 Vt. 293; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Konitsky v. Meyer*, 49 N. Y. 571; and especially by our principal case.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA

GREEN v. HARRISON.

[6 JONES'S EQUITY, 253.]

CLERK AND MASTER IN CHANCERY IS NOT PARTY TO SUIT SO AS TO ENTITLE HIM TO APPEAL from an interlocutory order appointing another than himself a commissioner to sell real estate, within the meaning of the North Carolina Revised Code, c. 4, sec. 23, which allows an appeal "at the instance of the party dissatisfied."

APPLICATION for a writ of *certiorari*. The opinion states the facts.

Winston, Sen., for the applicant.

B. F. Moore and Miller, contra.

By Court, BATTLE, J. This is an application to this court for a writ of *certiorari*, founded upon the following statement of facts: The widow and children of Bryan Green, deceased, filed their petition in the court of equity for the county of Wake, in which they set forth that the said Bryan Green had died intestate, leaving a large real and personal estate, and that Carter B. Harrison had been duly appointed his administrator; that the estate was very much indebted, so much so that it would require, not only all the perishable estate, but a considerable number of slaves to pay the debts, and that it would be very much to the interest of the petitioners, who were the widow and next of kin of the deceased, to have a part of the real estate sold, and substituted in the place of slaves in the payment of debts. Some of the petitioners were of full age, and others minors, who sued by their guardian, and a

decree was prayed to carry into effect the object of the petition. Carter B. Harrison, the administrator, was made defendant, and filed an answer, in which the facts stated in the petition were admitted, and he expressed the opinion that the best interests of the petitioners would be promoted by the course proposed. And an order of reference having been made to the clerk and master, he reported that it would be to the advantage of the petitioners to have the object of the petitioners carried out. A decree was thereupon made, ordering a sale of certain portions of the real estate, and appointing the administrator a commissioner to make the sale, etc. Robert G. Lewis, the clerk and master of the court, opposed so much of the decree as related to the appointment of the commissioner to make the sale, insisting upon his right to be appointed; and upon his opposition being overruled, prayed an appeal to the supreme court, which was refused.

The only question now presented to us, and upon which it is proper for us to express an opinion is, whether the applicant for a writ of *certiorari* had a right to appeal from the order made in the court of equity for Wake County. The order, notwithstanding the form of it, was an interlocutory one, made in the progress of a suit in equity. If the applicant had a right to appeal from that order, he must derive it from the provisions of the Revised Code, c. 4, sec. 23, which are as follows: "The superior court may, whenever it shall be deemed proper, allow an appeal to the supreme court, from any interlocutory judgment, sentence, or decree, at law or in equity, at the instance of the party dissatisfied therewith, upon such terms as shall appear to the court just and equitable, etc." The right of appeal, then, is given to a party to the suit. Who is a party to an action at law or a suit in equity? We understand that by such a party is meant one who is directly interested in the subject-matter, who has a right to make defense, control the proceedings, adduce testimony, cross-examine the witnesses introduced on the other side, and to appeal from the judgment or decree: See 1 Greenl. Ev., secs. 523, 535; 20 How. St. Tr. 538, note; 2 Bouvier's Law Dict. 284. All other persons are regarded as strangers to the action or suit. Tested by this definition, can the clerk and master claiming a right to be appointed a commissioner to sell lands in the progress of a suit in equity be deemed a party to the suit? Is he directly interested in the subject-matter of the suit? Or has he a right to make defense, con-

trol proceedings, adduce testimony, and cross-examine the witnesses of the opposite side? Certainly not. He cannot, then, in any proper sense, be deemed a party, and not being such, the statute does not give him any right of appeal.

Under the first section of the fourth chapter of the Revised Statutes of 1836, a right of appeal from the county to the superior court of law was given to either the plaintiff or defendant, or to any person "who shall be interested." Under the latter clause of this section, we held, in the case of *Murphrey v. Wood*, 2 Jones, 63, that a purchaser of land under an execution issued on a dormant judgment had such an interest in the subject as entitled him to intervene, and appeal from an order of the county court setting such execution aside. And again, in *Watkins v. Pemberton*, Id. 174, we decided that the next of kin of an intestate was interested in an order of the county court, obtained by an administrator, to sell the slaves belonging to the estate for distribution, instead of having them divided specifically, and that they might appeal from it. The clause under which these decisions were made has been omitted in the Revised Code, c. 4, sec. 1; and we presume such appeals could not now be allowed. No such provision was ever made in the grant of the right of appeal from the superior court of law or court of equity to the supreme court: See 1 R. S., c. 4, secs. 22, 23; Rev. Code, c. 4, secs. 22, 23; and it follows that no person but a party can appeal from the sentence, judgment, or decree of the former court to the latter. As the present applicant was not a person who could appeal from the interlocutory order made in the court of equity for Wake County, he cannot be allowed the writ of *certiorari*, to bring up the record of the suit, or any part of it, to this court.

We abstain from expressing any opinion in relation to the decree made in the court below, except merely to say that the present applicant cannot bring it before us for review, either by appeal or by writ of *certiorari*. The applicant must pay the cost of his motion.

Decree accordingly.

WHO MAY PROSECUTE APPEAL: See *Mills v. Hoag*, 31 Am. Dec. 271; *Wiggins v. Swift*, 39 Id. 716.

AM. DEC. VOL. LXXXII—27

BEVIS v. LANDIS.

[6 JONES'S EQUITY, 212.]

PURCHASER OF PROPERTY FROM DEBTOR AT PRIVATE SALE, SUBJECT TO LIEN OF EXECUTION, HAS NO EQUITY TO REQUIRE SHERIFF TO SELL OTHER PROPERTY REMAINING, SUFFICIENT TO SATISFY THE EXECUTION.

BILL in equity. The plaintiff's testator purchased from one Paschall, a slave, at a price expressed in the bill of sale of one thousand dollars. The slave, at the time, was subject to the lien of an execution against Paschall, and afterwards the slave was sold at public auction by the sheriff to the defendant, Landis. An agent of the plaintiff's testator attended the sheriff's sale, gave notice of the purchase, and pointed out other slaves and property from which the execution could be satisfied; but the sheriff, nevertheless, proceeded with the sale. The bill charged that the sheriff and the defendant were involved on account of Paschall, and the sale of the slave was made to relieve them from these liabilities. It prayed that Landis should convey the legal title to the slave to the plaintiff, deliver possession, and account for the services and profits of the slave.

B. F. Moore, for the plaintiff.

By Court, PEARSON, C. J. The bill is filed on the assumption that one who purchases at a fair price a slave or other articles of a debtor, whose property is subject to the lien of an execution, but who has other slaves and property besides the one sold, sufficient to satisfy the execution, is entitled to the protection of a court of equity, so that provided he gives notice to the sheriff of the fact of his being a purchaser of one of the slaves, and forbids the sheriff from selling that particular slave, and requires him to make the amount of the execution by selling some one of the other slaves, and the sheriff, nevertheless, proceeds to sell the particular slave, equity will, in favor of the purchaser at private sale, convert the purchaser at the execution sale into a trustee, if he is fixed with notice of the facts, and require him to convey the slave to the purchaser at private sale.

The bill is of "the first impression." No case or dictum was cited to support it, and we are not able to see any principle upon which such an equity can be based.

It is true, the title of a debtor is not divested by the execution. If he sells, the purchaser acquires the property subject to the lien of the execution. If that be removed his title is good, but if it be not removed, his title will be divested by a sale, under it, and neither a court of law or equity can control the power of the sheriff to make sale under the execution. Indeed, such an interference would give rise to much inconvenience, and greatly embarrass officers in the discharge of their duties. One man will say, "I have bought this negro and forbid you from selling him, because the other property is sufficient, out of which you can make your money." A second says, "I have bought this negro, and you must not sell him." So a third and fourth; and the sheriff may properly reply, "The law has not made it my duty to take care of your rights, or to settle priorities between you; I have power to sell any one, or all of these negroes, in order to satisfy the execution; it was your folly to buy property subject to my lien, without taking care to provide for the payment of the executions." This position of the sheriff is unanswerable. The courts could not interfere with the action of the sheriff under this general power given by the execution, even in behalf of a surety, whose property was sold, or was about to be sold, to pay the debt in the first instance, although it was known to the sheriff that the principal had property, out of which the debt could be made: See *Eason v. Petway*, 1 Dev. & B. 44. It was necessary to pass an express statute for the protection of the surety against the capricious and wanton exercise of this power by sheriffs and other officers: Rev. Code, c. 31, sec. 124. It has not been deemed expedient by the legislature to pass a statute for the protection of those who choose to buy property subject to the lien of an execution, and who fail to provide for its satisfaction.

The only case cited on the argument was *Smith v. McLeod*, 3 Ired. Eq. 390, and the counsel of the plaintiff contended there was a direct analogy between the relation of a surety and that of a purchaser, at a private sale, from a debtor, of property subject to the lien of an execution. We are not able to perceive the supposed analogy. In the case cited, the court agree there is no ground on which to control the action of the sheriff and relieve the surety, on the ground of a privacy between him and the creditor, by reason of which the creditor is bound to let the surety have the benefit of any security or lien which he has acquired as against the principal.

and decide that the active interference of the creditor in withdrawing from the hands of the sheriff an execution, under which a lien had attached to the property of the principal, was a discharge of the liability of the surety by matter *in pais*. But where is the analogy? There is no privity of relation between the creditor, in the execution, and one who chooses to purchase a part of the property, which is subject to the lien of his execution. On the contrary, such a purchaser, at private sale, is a stranger, and in fact, an intermeddling stranger, who had no business to buy any part of the debtor's property, without taking care to see that the prior lien was satisfied.

If the purchaser at private sale is not entitled to relief against the sheriff, or a purchaser under the execution sale, when the sale of the particular slave is made capriciously or wantonly by the sheriff, when the debtor has other property liable to execution, the case is much stronger against him when the sheriff having received other executions, junior to the private sale, thinks it to be his duty to sell the particular negro, under the older execution, in order so to conduct the business as to satisfy as many of the executions in his hands as the property of the debtor can be made to reach. For the sheriff acts as the agent of all the creditors, who have executions put into his hands, and his conduct then is not capricious or wanton, but in pursuance of a duty to the creditors imposed on him by having the executions in his hands.

Nor is the case altered by the fact that the sheriff and the purchaser at execution sale had an interest on account of their liability, as the surety or otherwise, of the debtor in the execution. The sheriff had the power under the older execution to sell this particular negro. It was his duty so to make the sales as to cause the property of the debtor to go as far as possible towards discharging all the executions in his hands, and neither his power or duty could be affected by the fact that he had a collateral interest which was subserved by the exercise of a power in the performance of his duty, and this can furnish no ground on which a stranger, who chose to interfere, can base any rights to have relief in equity.

The view we have taken of the case makes it unnecessary to decide whether the plaintiff was a *bona fide* purchaser, or one who had taken a bill of sale, absolute on its face, which was intended as a mere security, that fact not being expressed on the face of the bill of sale, in order to avoid the necessity of

giving notoriety to it by registration, so as to enable the debtor to conceal for a time the fact of his insolvency.

Bill dismissed.

EFFECT OF EXEMPTION LIEN AGAINST SUBSEQUENT PURCHASERS: See Freedom on Executions, sec. 195.

JOYNER v. JOYNER.

[6 JONES'S EQUITY, 322.]

CASES OF DIVORCE SHOULD BE SET FORTH IN PETITION PARTICULARLY AND SPECIALLY, under the North Carolina statute.

CIRCUMSTANCES MAY EXIST WHERE WIFE WILL NOT BE GRANTED DIVORCE BECAUSE HUSBAND STRUCK HER with a horse-whip, or switch, inflicting bruises.

PETITION for divorce. Appeal from an interlocutory order allowing alimony *pendente lite*. The petitioner alleged her marriage with the defendant; that she herself was well-bred and of respectable family, and that her husband was not less than a fair match for her; that her husband had struck her with a horse-whip on one occasion, and with a switch on another, leaving several bruises on her person; and that on several occasions, he had used abusive and insulting language towards her. The petition concluded as set forth in the opinion of the court.

Barnes, for the plaintiff.

W. N. H. Smith, for the defendant.

By Court, PEARSON, C. J. The legislature has deemed it expedient to enlarge the grounds upon which divorces may be obtained; but as a check or restraint on applications for divorces, and to guard against abuses, it is provided that the cause or ground on which the divorce is asked for shall be set forth in the petition "particularly and specially." It is settled by the decisions of this court that this provision of the statute must be strictly observed, and the cause or causes for which the divorce is prayed must be set forth so "particularly and specially," as to enable the court to see on the face of the petition that if the facts alleged are true, the divorce ought to be granted: *Everton v. Everton*, 5 Jones, 202. The correctness of this construction is demonstrated by the fact that, upon appeals from an order allowing alimony pending

the suit, like the present, this court is confined expressly to an examination of the cause or causes of divorce, as set out on the face of the petition, and can look at nothing else, in making up the decision: Rev. Code, c. 40, sec. 15.

By the rules of pleading in actions at the common law, every allegation of fact must be accompanied by an allegation of "time and place." This rule was adopted in order to insure proper certainty in pleading, but a variance in the *allegata* and *probata*, that is, a failure to prove the precise time and place, as alleged in the pleading, was held not to be fatal, unless time or place entered into the essence, and made a material part of the fact relied on, in the pleading.

There is nothing on the face of this petition to show us that time was material, or a part of the essence of the alleged cause of divorce, that is, that the blows were inflicted at a time when the wife was in a state of pregnancy, with an intent to cause a miscarriage, and put her life in danger; and there is nothing to show us that the place was a part of the essence of the cause of divorce, that is, that the blows were inflicted in a public place, with an intent to disgrace her, and make her life insupportable,—so we are inclined to the opinion that it was not absolutely necessary to state the time and place, or if stated, that a variance in the proof, in respect to time and place, would not be held fatal.

But we are of opinion that it was necessary to state the circumstances under which the blow with the horse-whip, and the blows with the switch, were given; for instance, what was the conduct of the petitioner; what had she done, or said, to induce such violence on the part of the husband? We are informed by the petitioner that she was a woman, "well-bred, and of respectable family, and that her husband was not less than a fair match for her." There is no allegation that he was drunk, nor was there any imputation of unfaithfulness on either side (which is the most common ingredient of applications for divorce), so there was an obvious necessity for some explanation, and the cause of divorce could not be set forth, "particularly and specially," without stating the circumstances which gave rise to the alleged grievances.

It was said on the argument that the fact that a husband on one occasion "struck his wife with a horse-whip, and on another occasion with a switch, leaving several bruises on her person," is of itself a sufficient cause of divorce, and consequently the circumstances which attended the infliction of

these injuries are immaterial, and need not be set forth. This presents the question in the case.

The wife must be subject to the husband. Every man must govern his household, and if by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family, without which he cannot expect to govern them, and forfeits the respect of his neighbors. Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said: "Thy desire shall be to thy husband, and he shall rule over thee": Gen. iii. 16. It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place. Why is it, that by the principles of the common law, if a wife slanders or assaults and beats a neighbor, the husband is made to pay for it? Or if the wife commits a criminal offense, less than felony, in the presence of her husband, she is not held responsible? Why is it that the wife cannot make a will disposing of her land, and cannot sell her land without a privy examination, "separate and apart from her husband," in order to see that she did so voluntarily, and without compulsion on the part of her husband? It is for the reason that the law gives this power to the husband over the person of the wife, and has adopted proper safeguards to prevent an abuse of it.

We will not pursue the discussion further. It is not an agreeable subject, and we are not inclined unnecessarily to draw upon ourselves the charge of a want of proper respect for the weaker sex. It is sufficient for our purpose to state that there may be circumstances which will mitigate, excuse, and so far justify the husband in striking the wife "with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person," so as not to give her a right to abandon him, and claim to be divorced. For instance, suppose a husband comes home, and his wife abuses him in the strongest terms,—calls him a scoundrel, and repeatedly expresses a wish that he was dead and in torment; and being thus provoked in the *furor brevis*, he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologize, and expresses regret for having struck her; or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact,

she becomes furious and gives way to her temper, so far as to tell him he lies, and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeats it again he will strike her, and after this notice she again repeats the insulting words, and he thereupon strikes her several blows,—these are cases in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorize the court to dismiss her petition, with the admonition, “If you will amend your manners, you may expect better treatment”: See Shelford on Divorce. So that there are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce. It follows that when such acts are alleged as the causes for a divorce, it is necessary in order to comply with the provisions of the statute to state the circumstances attending the acts, and which gave rise to them.

It was suggested that the averment at the conclusion of the petition, which is made after the averment, “that the facts which are made the ground of this complaint have existed at least six months prior to the filing of this bill; . . . your petitioner, during the whole time of her intermarriage with defendant, saith that she has been a dutiful, faithful, and affectionate wife, and desired so to continue during life, but the outrages upon her person and rights have made it her desire, as well as duty, to seek a perpetual separation from him,” is sufficient to supply the defect in not setting out, “particularly and specially,” the circumstances under which the blows were inflicted on her person.

We do not think a general averment of this kind, unconnected as it is with the allegations of fact, can be allowed to have the effect of the particular and special statement which the statute requires. It is not traversable, and we cannot say, as a conclusion of law, what may, in her opinion, be such conduct as is consistent with the character of a dutiful, faithful, and affectionate wife. It is unnecessary to notice the other matters of complaint set out in the petition, because they are admitted not to be, of themselves, sufficient, and are put in as makeweights, or props of the main causes, which we have fully adverted to.

Nor is it necessary to notice the objection because of the fact that the bill had not been exhibited to a judge, and his fiat for process obtained.

There is error; the decretal order will be reversed, and this opinion will be certified, to the end that the court of equity below may proceed.

Decretal order reversed.

ACTS CONSTITUTING CRUELTY SHOULD BE PARTICULARLY STATED IN PETITION FOR DIVORCE: *Nogees v. Nogees*, 58 Am. Dec. 78. The principal case is quoted in *White v. White*, 84 N. C. 342, to the point that in an action for a divorce on the ground of cruelty, it is necessary to state the circumstances connected with the assaults charged, and the causes which brought them on.

CRUELTY, WHAT IS, WITHIN MEANING OF LAW OF DIVORCE: See *Poor v. Poor*, 29 Am. Dec. 664, and note discussing the question; *Payne v. Payne*, 40 Id. 660; *Nogees v. Nogees*, 58 Id. 78. The principal case is distinguished, in *Taylor v. Taylor*, 76 N. C. 435, as resting mainly upon the ground of the insufficiency of the pleadings.

CASE AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

POWELL v. INMAN.

[8 JONES'S LAW, 424.]

**BOND EXECUTED TO ENABLE OBLIGEE TO DEFRAUD HIS CREDITORS IS INVALID
as against the obligor.**

DEBT on a bond, executed by the defendant, Robert Inman, to his brother, Jesse Inman, and indorsed to the plaintiffs for a valuable consideration. Jesse Inman had made a pretended transfer of certain personal property to the defendant, who executed the bond in question in payment therefor, to enable the defendant to set up a claim to the property, when the sheriff should go to levy on the property under executions against Jesse Inman. The court instructed the jury that if the bond was given for the above purpose, the plaintiffs could not recover. The defendant had a verdict, and the plaintiffs appealed.

Shepherd, Strange, and W. A. Wright, for the plaintiffs.

Leitch and M. B. Smith, for the defendant.

By Court, BATTLE, J. This case is brought before us again, for the purpose, as we are informed, of having reviewed the decision which we made in it at December term, 1859: See *Powell v. Inman*, 7 Jones, 28. In the argument now submitted by the counsel for the plaintiff, he admits the correctness of the general principle, that a contract, the consideration of which is the doing of an act, either *malum in se* or *malum prohibitum*, is void, and no action at law can be sustained upon it. He also admits that the fact of the contract's being under seal does not preclude the illegality of the consideration from being

inquired into and urged as a defense: See Broom's Com. 91, Law Lib. 280, and several pages following. But he contends that a bond for the payment of money, though made for the express purpose of defrauding the obligor's creditors, is valid as against him, by force of the statute of 13 Eliz., c. 5, sec. 2; Rev. Code, c. 50, sec. 1. By reference to that statute, it will be seen that bonds are mentioned along with several kinds of conveyances made with the intent to delay, hinder, and defraud creditors, which are declared to be utterly void and of no effect, only, however, as against those persons who are hindered, delayed, and defrauded of their debts; and it is inferred that bonds as well as conveyances of property are good and valid against those who execute them in favor of the obligee and grantee.

This argument confounds the distinction between the nature and effect of a bond and an executed conveyance. The former is a chose in action which may require the aid of a court, through the means of an action or suit, to give the obligee the benefit of it, while the latter transfers at once the title of the property granted or sold to the grantee or bargainee. Hence to the former the well-established maxim of *Ex dolo malo non oritur actio* may apply, while it is entirely inapplicable to the latter, which does not require the aid of a court to transfer the property. The fraudulent grantee or bargainee has, then, the advantage of his grantor or bargainer, because, having the property by force of the conveyance, the grantor or bargainer will be met, when he applies to be relieved against it, with the objection that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act": *Holman v. Johnson*, 1 Cowp. 343. The statute of frauds, 13 Elizabeth, in making void and of no effect conveyances intended to defraud creditors, as to the creditors only, and leaving them in full force in other respects as between the parties, does not contravene that rule. But if the statute is to be construed as to its effect upon fraudulent bonds in the manner contended for by the plaintiff's counsel, it will violate the rule, and produce the strange and unnecessary anomaly that while the obligee in a bond founded upon the illegal consideration of compounding a felony, gaming, usury, restraining trade, restraining marriage, and the like, he may do so if the consideration were that of a most gross and outrageous attempt to cheat and defraud creditors. But the words of the statute may be satisfied without the necessity of adopting any such

CASES
IN THE
SUPREME COURT
OF
OHIO.

PRESTON v. BOWERS.

[12 OHIO STATE, 1.]

IN ACTION BY HUSBAND FOR DAMAGES FOR ENTICING AWAY HIS WIFE, he may give in evidence the declarations of his wife made shortly prior to the alleged seduction, in order to show the state of her feelings towards him at that time, whether the declarations were made before or after her marriage with the plaintiff; but it is erroneous to admit on this ground declarations of the wife concerning the words and acts of the defendant, and tending to prove the charges against him, as such evidence is merely hearsay.

DECLARATIONS OF PERSON NOT DEFENDANT IN ACTION FOR ENTICING AWAY PLAINTIFF'S WIFE, but charged in the petition as having conspired with the defendants for that purpose, are admissible, in the first instance, to show his connection with the conspiracy, but they are not evidence against the defendants, and the jury must be instructed to disregard them unless, in the first place, the conspiracy is proved to the satisfaction of the jury, and unless, secondly, the declarations were made in furtherance of the common design.

IT IS NOT ERROR TO INSTRUCT JURY IN ABSENCE OF PARTY AND HIS COUNSEL, where the jury after retiring come into court while it is still in session and ask further instructions, and the absent party and his counsel are first loudly called for at the door.

ACTION by Bowers against Preston, Margaret Preston, his wife, and Griffin, in which the defendants were alleged to have combined and confederated to entice away the plaintiff's wife, and to have unlawfully enticed her to renounce his society. A verdict was rendered in favor of the plaintiff, but the judgment was arrested on the ground that Margaret Preston was improperly joined as defendant; whereupon Bowers, by leave

of court, filed an amended petition against Preston and Griffin, charging that they combined and confederated with Margaret Preston, and enticed his wife to renounce his society, etc. At the trial, the plaintiff, Bowers, was allowed to testify as to declarations of his wife made to him, and relating in great part to what defendants had said and done in alienating her affections from him, and in inducing her to leave him. Some of the declarations were made before and some after the marriage of the plaintiff and his wife, and they were admitted, against the objection of the defendants, on the ground that it was competent for the plaintiff to state the declarations of his wife, for the purpose of showing her feelings toward him at that time. Bowers also testified to a conversation between himself and Margaret Preston, in the presence of his wife, but in the absence of the defendants, at the house of Mrs. Preston, and that Mrs. Preston said "that his presence there was no longer agreeable; that though he was married to her sister, she was not his wife, and she should never live with him again if she, Mrs. Preston, could help it." This was objected to on the ground that Mrs. Preston was not a party to the record. Other declarations of Mrs. Preston to other persons were admitted, though they were not made in the presence of either of the parties to the suit, or in the presence of the plaintiff's wife, and were never communicated to her. This evidence was also objected to. It also appeared from the record that after the jury had retired to consider their verdict, but while the court was still in session, the defendant Preston and his counsel having left the court-house, and the plaintiff, Bowers, and one of his counsel remaining, the defendant Griffin not having been present during the trial, the jury asked leave of the court to return into court; whereupon the court ordered the sheriff to call the defendants and their counsel by name at the door of the court-house, and the sheriff called each of the defendants and each of their counsel by name three times, in a loud voice, at the door of the court-house, but neither of them answered. The jury were then allowed to come into court, and the court, in the absence of the defendants and their counsel, instructed the jury upon points of law in the case, and the jury then again retired, and returned a verdict for the plaintiff. The defendant moved for a new trial. The motion was overruled, and judgment entered on the verdict. To reverse this judgment, the defendants now file their petition in error.

S. W. Andrews and N. H. Swayne, for the plaintiffs in error.

R. B. Warden, James E. Wright, and Samuel Galloway, for the defendant in error.

By Court, BRINKERHOFF, J. The plaintiff had a right to give in evidence the declarations of his wife made recently prior to the alleged seduction, in order to show the state of her feelings toward him at that time: 1 Greenl. Ev., sec. 102; *Palmer v. Crook*, 7 Gray, 418; and inasmuch as her declarations, given in evidence in this case, were all made at a time shortly before the seduction alleged, we can see no good reason why a distinction should be taken between those made before and those made after the marriage. Before marriage, the plaintiff could have no legal claim upon the affections of the woman he was courting; and if the object of giving her declarations in evidence had been to show that Griffin had been guilty of a wrong, her declarations made before marriage would, for this reason, as well as others, be inadmissible. But her declarations were admissible for no such purpose. They could be given only to show the state of her affections toward the plaintiff shortly prior to the alleged seduction; and we are not prepared to say that the intervention of a marriage between the parties so far alters the presumptions of fact arising from evidence of this kind as to demand the exclusion of declarations made by her prior to the marriage, if they were made as recently prior to the alleged seduction as to give rise to the reasonable presumption of the continuance of the state of mind indicated by them up to the time of the alleged seduction.

The plaintiff had a right to give the declaration of his wife in evidence, to show the state of her affections toward him recently before the alleged seduction. But the exercise of a right, and the abuse of a right, are two very different things. The words and acts of the defendant Griffin, reported by the wife to the husband, and detailed by him in evidence to the jury, were nothing but hearsay, and in themselves clearly inadmissible.

It is said in argument, however, that the declarations of the wife in regard to the state of her affections towards the plaintiff were so blended with her report of the acts and declarations of Griffin as to render the separation of them impracticable. We do not think so. It seems to us there would have been no practical difficulty in a statement of those declarations of his

wife which tended to express attachment to him, and at the same time withholding her report of the words and acts of Griffin. And we cannot avoid the conviction, that while the plaintiff was claiming to give in evidence the declarations of his wife for a legitimate purpose, his real and primary object was to bring before the jury her statement of the words and acts of Griffin. In permitting this to be done, we are of opinion the court below erred.

In admitting testimony as to declarations made by Mrs. Preston, wife of one of the defendants, we cannot say that there was error. True, she is not now a party to the suit, yet she stands charged in the petition with being a conspirator with her husband and Griffin in committing the injury complained of. Her declarations which, so far as the record discloses, were given in evidence, certainly were not in themselves alone legitimate evidence against the defendants; those declarations having been made in the absence of the defendants, and never having been communicated to plaintiff's wife. The defendants being absent, no presumption of assent to or responsibility for her declarations, on their part, can exist; and never having been communicated to the plaintiff's wife, they could not have been instrumental in the furtherance of the conspiracy charged in the petition. If the evidence in respect to the conduct of Mrs. Preston stopped here, it was the duty of the court, if requested, to instruct the jury to disregard her testimony; and the presumption is that the court performed its duty in this respect. But Mrs. Preston being charged as a conspirator, it was competent for the plaintiff to make his charge in that behalf good by proofs; and having done so to the satisfaction of the jury, then other declarations of hers which might be given in evidence, as well as her acts, would become evidence against the defendants, provided those declarations were made in furtherance of the common design,—tending to effectuate the object of the conspiracy,—and so becoming not mere words but verbal acts: *Foutz v. State*, 7 Ohio St. 471. Now, the declarations of Mrs. Preston, given in evidence and excepted to, tended, in connection with other evidence which may have been given, to prove the conspiracy charged in the petition; and for this purpose they were competent. Whether such further evidence was given in the case as would make them finally relevant to the issue, we are not informed; for the bill of exceptions contains only a statement of detached portions of the evidence. And in the absence of

any showing in the record to the contrary, it is to be presumed either that such further evidence was given, or that the jury were instructed to disregard the declarations of Mrs. Preston.

Under the circumstances disclosed in the bill of exceptions, there was no impropriety and no error in the fact that the court, at the request of the jury, gave them further instructions in the absence of plaintiff in error and his counsel.

Judgment reversed, and cause remanded.

SUTLIFF, C. J., and PECK, GHOLSON, and SCOTT, JJ., concurred.

HUSBAND MAY MAINTAIN ACTION ON CASE FOR ENTICING AWAY HIS WIFE: *Barber v. Armistead*, 51 Am. Dec. 404; see also *Gilchrist v. Bale*, 34 Id. 469.

CHARGING JURY IN ABSENCE OF COUNSEL IS ERROR: *Davis v. Fish*, 48 Am. Dec. 337.

CENTRAL OHIO R. R. Co. v. LAWRENCE.

[12 OHIO STATE, 66.]

OWNER OF CATTLE FOUND ON UNFENCED RAILROAD IS NOT TRESPASSER or wrong-doer, but is entitled to the exercise of ordinary and reasonable care on the part of the railroad company under all circumstances to avoid any injury to his cattle.

RAILROAD COMPANY OPERATING UNFENCED ROAD IS NOT LIABLE FOR INJURIES TO CATTLE found on its track, if its use of the track is reasonable, and it exercises reasonable care under all circumstances to avoid the injury; but for an injury to cattle resulting from the unreasonable and dangerous use of the railroad, or from the want of such care, the company will be liable.

RAILROAD COMPANY IS NOT BOUND TO CONSIDER INCREASED RISK TO CATTLE on its unfenced track in determining the rate of speed at which its trains shall run, such speed being otherwise reasonable and proper in view of the object to be accomplished. A high rate of speed, though dangerous, is a reasonable use of the land, because it is for a proper object, and a highly beneficial purpose, and the danger may be avoided by proper care.

OWNERS OF CATTLE WHO PERMIT THEM TO RUN AT LARGE in the vicinity of an uninclosed railroad track can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of its road, the capacity of its locomotive power, and the safety of the persons and property carried, shall, with due regard to the safety of the persons and property in their charge as the paramount consideration, exercise ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road.

WHERE THERE IS NOTHING IN RUNNING OF TRAIN OR ITS RATE OF SPEED at a particular time and place inconsistent with the general and legitimate conduct of the business of the railroad company, the occasion and necessity therefor do not concern the owner of cattle running at large,

and he cannot inquire whether the rate of speed was greater than usual for a particular train at a particular place, and what was the object of such rate.

WHERE IT DOES NOT APPEAR THAT RATE OF SPEED AT WHICH TRAIN WAS RUNNING was a rate at which the railroad company, in the ordinary and legitimate conduct of its business, might not reasonably run its train, the inquiry in an action for injuries to cattle on an uninclosed track must be confined to the question whether, under the circumstances of the case, the defendants exercised reasonable and proper care in running their engine to avoid injury to the cattle of the plaintiff, and this question is for the jury.

ACTION by Lawrence against the railroad company to recover damages for an injury by a locomotive to cattle on the track, caused, it was alleged, by the negligence of those in charge of the train. The plaintiff introduced testimony tending to show that the train was running at a speed unusually fast for that train at the place where the injury was inflicted. The defendant's evidence tended to show that the injury to the cattle happened at night; that the train was behind time, and had connections to make with other passenger trains, and was running little if any faster than usual, and the increased rate of speed would not increase the danger to cattle. The court instructed that if the jury were satisfied that when the cattle were killed the cars were being run faster than the usual or ordinary speed of the train at the place of injury, and that such unusual speed contributed directly to the injury, and was not necessary to avoid a collision or make a connection with some other train, then the verdict must be for the plaintiff. That one of the considerations to determine the rate of speed at which cars may be run is the fact that cattle are liable to stray upon the track of unfenced railroads; and in determining whether the train shall be run at an unusual speed, except when the speed shall be necessary in order to avoid a collision, or to make a connection, or to attain some such desirable end, the agents of the company must consider the danger to cattle consequent upon such unusual speed. But the defendants could not in any case be held liable because of unusual speed, unless it appeared that it contributed directly to the injury. To these instructions the defendant excepted, and the verdict and judgment being for the plaintiff, filed a petition in error.

C. B. Goddard, for the plaintiff in error.

H. Skinner, for the defendant in error.

By Court, GHOLSON, J. The relation toward each other, of a railroad company operating an unfenced road and the owners of cattle, has been settled by several decisions of this court: *Kerwhacker v. Cleveland C. & C. R. R. Co.*, 3 Ohio St. 172 [62 Am. Dec. 246]; *Cincinnati H. & D. R. R. Co. v. Waterson*, 4 Id. 424; *Cleveland C. & C. R. R. Co. v. Elliott*, Id. 474.

The difficulty now is in the application of the principles established by those decisions.

The owner of cattle found on an unfenced railroad is not to be regarded as a trespasser or wrong-doer, but is entitled to the exercise of ordinary and reasonable care, under all the circumstances, to avoid any injury to his cattle. A railroad company, like any other land proprietor, has a right to the free, exclusive, and unmolested use of its railroad track, not exempt, however, from the duty of so using its own property as to do no unnecessary injury to another, and bound, when using its property in a mode which may result in injury to another, to the exercise of due care. If a railroad company is in the reasonable use of its railroad track—its own property—with reference to any rights of others, and on the occasion of an injury to cattle found on the railroad track, exercises reasonable care, under all circumstances, to avoid the injury, it cannot be held liable to the owner of the cattle. But, if as to any right of such owner, the use being made of the railroad track is unreasonable and dangerous, or there is a want of proper care to avoid injury to his cattle found on the track of the road, and there is injury resulting from such unreasonable and dangerous use of the railroad track, or from such want of care, the railroad company will be liable therefor to the owner.

The question is, What, as to the owner of cattle, is to be regarded an unreasonable and dangerous use of its railroad track by the company? It is certainly not enough that the use should be dangerous, it must also be unreasonable, and that with reference to some right of the owner of the cattle. The very object of a railroad is the transportation of persons and property at a high rate of speed by means of ponderous engines and cars, and this must necessarily be dangerous to cattle coming on the track. That the owners of cattle have no such right or interest in the uninclosed lands of their neighbors as to entitle them to claim that its use for a railroad is unreasonable, is settled by the decisions to which reference has been already made. Have they any right to complain

as to the degree of speed at which it may be the interest of a railroad company to transport persons and property, and at which persons may be willing to have themselves and their property carried on a railroad? We do not think that they have any such right; and the admission of such a right would be inconsistent with the progress of improvement in facilities for travel and commerce, with which progress such a right as that of an owner of cattle to have them run on the uninclosed lands of others ought not to interfere. In determining, therefore, the rate of speed at which its trains shall run, the same being otherwise reasonable and proper in view of the object to be accomplished, we do not think a railroad company is bound to consider the increased risk to cattle on its track, which may be thereby occasioned, and lessen the speed on that account.

The use, on land, of engines and cars running on a railroad track, at a high rate of speed, though dangerous, is a reasonable use of land, because it is for a proper object, and a highly beneficial purpose, and the danger may be avoided by proper care. There is certainly a risk of cattle running at large in the vicinity of an uninclosed railroad track, but this risk the owners of cattle must take, unless they choose to avoid it by keeping the cattle within their own inclosures. If they do not choose to do this, they can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of its road, the capacity of its locomotive power, and the safety of the persons and property carried, shall, with due regard to the safety of persons and property in their charge, being the paramount consideration, exercise what, "in that peculiar business would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road": *Keruhacker v. Cleveland C. & C. R. R. Co.*, 3 Ohio St. 173 [62 Am. Dec. 246]. Where there is nothing in the running of a train, or in its rate of speed, at a particular time and place, inconsistent with the general and legitimate conduct of the business of the railroad company, we cannot see how the occasion and necessity therefor can properly concern an owner of cattle running at large. He cannot properly discuss with the company the proper exercise of the discretion vested in its agents as to the time or occasion of running its trains, and has no right to bring forward its time-table and list of connections, and enter into an

Inquiry whether the rate of speed was greater than usual for a particular train, at a particular place, and whether such rate of speed was necessary to make a connection or avoid a collision, or for some other proper object.

No evidence is referred to in the bill of exceptions which shows that the rate of speed at which the train was running was a rate at which the railroad company, in the ordinary and legitimate conduct of its business, might not reasonably and properly run its trains. Such being the case, we think the inquiry should have been limited, in accordance and in connection with the rights and liabilities established in such cases, as in the case of *Cleveland C. & C. R. R. Co. v. Elliott*, 4 Ohio St. 474, to the question, "whether, under all circumstances of the case, the defendants exercised reasonable and proper care in running their engine to avoid injury to the cattle of the plaintiff." And as said in the case of the *Cincinnati H. & D. R. R. Co. v. Waterson*, Id. 434: "The facts and circumstances relied upon to show a want of proper care were for the exclusive consideration of the jury."

In accordance with these views, the judgment of the district court, and of the court of common pleas, must be reversed, and the case remanded to the court of common pleas for another trial.

Judgment reversed.

SUTLIFF, C. J., and PECK, BRINKERHOFF, and SCOTT, JJ., concurred.

LIABILITY OF RAILROAD COMPANIES FOR INJURIES TO CATTLE UPON UNFENCED TRACK: See *Chopin v. Sullivan R. R.*, 75 Am. Dec. 237, and note 240, collecting the prior authorities; *Gorman v. Pacific R. R.*, 72 Id. 230; *Sullivan v. Philadelphia etc. R. R. Co.*, Id. 698, and notes. This subject is treated in the note to *Tonawanda R. R. Co. v. Menger*, 49 Id. 261-262.

BOMBERGER v. TURNER.

[12 OHIO STATE, 262.]

EQUITY HAVING OBTAINED JURISDICTION OF PARTIES AND SUBJECT-MATTER should retain the cause and do complete justice between the parties, in order to avoid a multiplicity of suits.

HEIRS OF FRAUDULENT GRANTEE OF LAND WHO HAVE INNOCENTLY MADE IMPROVEMENTS while in possession, and paid the taxes for several years, are entitled to compensation for their expenditures in a suit in equity by a creditor of the grantor, to subject the land to the payment of his judgment, against the grantor; and an answer setting out such expenditures

and asking, in case the deed be set aside, for the ascertainment of the amount thereof and its payment out of the proceeds of the sale, is good on demurrer.

DEEDS DIRECTING LOT TO BE APPRAISED AND SOLD FREE FROM IMPROVEMENTS made thereon by the defendants, and saving the right of the defendants under the occupying claimant law, in a suit in equity to subject the lot to the payment of a third person in which the defendants are entitled to the value of their improvements, is erroneous, since the defendants are entitled to that relief in that action.

GRANTOR IS COMPETENT WITNESS TO PROVE FRAUD IN DEED to his deceased grantee under Ohio code, in a suit by his judgment creditor against him and the heirs of his grantees.

ANSWER THAT DEFENDANT "DOES NOT ADMIT" MATERIAL AVERTMENT OF PETITION does not put plaintiff upon proof of its truth.

AVERTMENT OF ISSUANCE OF EXECUTION AND RETURN OF NO PROPERTY, etc., is not necessary in a petition by a judgment creditor under the Ohio code to set aside a fraudulent deed and subject the land to the payment of his judgment if the fact of no property is averred. The fact of no property in the judgment debtor, and not the return upon execution, is made the basis of the action.

Suit by Turner as administrator of Clyne, deceased, against William Bomberger and others, the heirs of George W. Bomberger, and one William M. Seely. Judgment for the plaintiff, and petition in error filed by the defendants, the heirs of Bomberger, deceased. The opinion states the case.

P. P. Lowe, for the plaintiffs in error.

John Howard, for the defendant in error.

By Court, PECK, J. The error first assigned is, that the court below erred in sustaining the demurrer to the additional answer of P. P. Lowe and wife, as to improvements and expenditures made by him upon the premises in controversy.

It appears from the petition and original answer that P. P. Lowe and Anne, his wife, in right of the said Anne, had been in peaceable possession of said premises (lot No. 988), in the city of Dayton, for several years prior to the commencement of the suit, improving the same, and claiming title thereto under a deed duly executed to them and William Bomberger, as heirs of George W. Bomberger, deceased, by the sheriff of Montgomery County, on a judicial sale of said lot, made in good faith and for value, to their said ancestor, as the property of William M. Seely, who, as the petition avers, then was, and still is, the owner of said premises. The additional answer alleges, that when said lot came into the possession of Lowe and wife, it was vacant and unoccupied, and that while in their possession P. P. Lowe had innocently expended large sums of

money, in said additional answer specified, for taxes from 1846 to 1859, inclusive, and for curbing, guttering, and filling up said lot, under the orders of the city counsel; and also in erecting a house thereon. The additional answer asked that in case the deed should be set aside, the amount of Lowe's expenditures, after deducting all rents received, which are specifically stated, should be ascertained by the court before ordering a sale, and the amount thus ascertained paid over to him out of the proceeds of the sale.

The facts stated in the additional answer are not pleaded in bar of the action, as the counsel for defendant in error seems to suppose, but as creating a right in equity to a portion of the proceeds, if a sale should be ordered, as demanded by petitioner.

The action is a suit in equity to subject lands, fraudulently aliened, to the payment of a judgment against the grantor, in the hands of the grantee's heirs, who, as admitted by the demurrer, were ignorant of the fraud, and made the improvements innocently, while in possession of the premises.

It would seem from this statement that the relief asked should have been granted in the same action, in analogy to the relief given in actions for the recovery of real estate, under the "act for the relief of occupying claimants of land." Equity had obtained jurisdiction of the parties and subject-matter, and should, therefore, in order to avoid a multiplicity of suits, retain the cause, and do complete justice between the parties. That this may be done in such cases by courts of equity, is well settled in this state: *Henry v. Doctor*, 9 Ohio, 49; *Salmond v. Price*, 13 Id. 369 [42 Am. Dec. 204].

It is true that the fraud of Bomberger, found by the court below, avoids the title cast by descent upon his heirs; but they are not charged with actual knowledge of the fraud, and are admitted by the demurrer to have made the improvements innocently, while in possession of the lot; and we are of the opinion that the fraud of the ancestor, of which they were ignorant when the improvements were made, should not deprive them of compensation for their expenditures; especially where the laches of the creditor, as in the present case, left them for a series of years in possession of the premises, thereby inducing a belief that their title was indisputable.

In our opinion, the demurrer to the additional answer should have been overruled, and the court, having found the transfer fraudulent and void, should have directed an investi-

gation to ascertain the amount of the expenditures for which the defendant Lowe was thus equitably entitled to compensation; and this brings us to notice the decree pronounced by the superior court, to which exception is also taken.

The decree orders a sale of the premises to satisfy the judgment, but "saves the right of defendants under the occupying claimant law," and directs an appraisement of the lot, "free from improvements made thereon by said defendants."

This decree is liable to several objections:—

1. Even if it were a case to which the statute was, in terms, applicable, the court, having possession of the cause, should have administered relief in pursuance of its provisions; but the suit not being of that character, the court should have granted the relief in analogy to the statute, and permitted the defendants to retain possession until such relief was accorded.

2. A portion of the improvements, the curbing and guttering done under the order of the city council, are not upon the premises, but necessarily enhance the value of the lot. The effect of these improvements could not be disconnected from the lot in its valuation by the appraisers, and would not, perhaps, be a subject for compensation under the statute. So, too, the taxes paid by the defendant, whereby the lot was saved from forfeiture, are not within the letter of the statute, in actions other than suits against purchasers at tax sales; but they are all, we think, clearly within its spirit, and when administering relief in analogy to the statute, may very properly be made subjects of equitable compensation.

A still more serious objection to this decree is, that instead of terminating litigation, it inaugurates further controversies. It authorizes, if it does not invite, subsequent litigation as to the value of the improvements, and has, therefore, a direct tendency to embarrass or prevent all sales under it. It expressly exempts the improvements from valuation and sale, and affects to confer upon the purchaser a title to the naked lot, subject to the right of the defendant to establish, in further proceedings, the value of the improvements upon it. The amount of such future recovery is necessarily uncertain, and but few would be willing to hazard the purchase. A sale under a judicial order ought always to confer upon the purchaser a title freed from all claims of the litigant parties.

3. It is insisted that the court erred in permitting Seely, one of the defendants, after the decease of George M. Bomberger, the ancestor of plaintiffs in error, to prove a fraudulent combi-

nation between himself and said George to defraud the plaintiff below, and prevent his subjection of said lot to the payment of his judgment.

Waiving the question whether the fraudulent grantor, in suits by creditors to set aside the conveyance, is an adverse party to his grantee, in the sense of section 313 of the code, it is sufficient for us to say that the present case does not come within any of the exceptions created by that section. Bomberger's administrator was not, and indeed, could not properly have been, made a party to the suit below.

Seely, though a party to the suit, is a competent witness, under section 310, and section 313 incapacitates him from testifying only in those cases "where the adverse party is the guardian of an idiot, lunatic, or deaf and dumb person, or the executor or administrator of a deceased person, or the guardian of a child or children of a deceased person, when the facts to be proved transpired before the death of such deceased person," etc. This section sedulously avoids extending its protection to adult heirs as such, though its propriety could hardly have escaped consideration in draughting the provisions as to executors, administrators, and guardians. The section has been revised, altered, and modified several times by the legislature, and it would be going too far for us, on its assumed propriety, to add a disqualification to those already specified, and thus in effect to repeal, *pro tanto*, section 310 of the code.

4. It is insisted that the court also erred in rendering judgment for plaintiff below, without proof that Seely had no property subject to levy, that fact having been put in issue, it is said, by the pleadings.

The petition avers that "the said Seely has no property whereon to levy," while the answer says merely, "these defendants do not admit that said Seely has no property on which to levy." Here, certainly, is no denial of the averment, much less any affirmation that Seely had such property, the proper way to controvert such negative averment. Nor is there any reason stated for the absence of such affirmation or denial. There was then no such controverting of the averment as put the plaintiff upon proof of its truth: Code, sec. 127. A mere call for proof, unaccompanied by a denial, would not have imposed such obligation upon the plaintiff: *Bentley v. Dorcas*, 11 Ohio St. 309.

5. It is also claimed that the absence of an averment in the

petition of the issuance of an execution upon the judgment, and its return of no property subject to levy, is fatal to the plaintiff's action, and that the demurrer to the answer, reaching back to the petition, requires a reversal of the judgment for this cause.

Section 458 of the code, which in this respect is but a reprint of section 16 of the act directing the mode of proceeding in chancery (Swan's Stat. of 1841, p. 704), makes the fact of no property in the judgment debtor, and not the return upon an execution, the basis of an action to subject the debtor's equitable interest in real estate, etc. Under the chancery act above referred to, it was well settled that the issuance of an execution and its return was not necessary, if the fact of no property is averred in the petition: *Gilmore v. Miami Exporting Co.*, 2 Ohio, 294; *Piatt v. St. Clair's Heirs*, 6 Id. 227. The statute conferred the right of action, and it would seem, if it is made to depend on the want of property in the judgment debtor subject to levy, that the averment of such want of property is all that is necessary, and indeed much more satisfactory than the averment that an execution had been returned indorsed no property found. Such a return is, at most, only evidence of the fact, and may be true, although the debtor in fact had such property. We see no occasion, therefore, to disturb the rule heretofore sanctioned by this court, and clearly defensible upon property.

Lastly, it is claimed that the finding of the superior court that the transfer of lot No. 988 from Seely to Bomberger, deceased, was fraudulent and void, as against the defendant in error, is contrary to the evidence.

The bill of exceptions purports to set forth all the testimony given at the trial. We have carefully considered the testimony thus set forth, and notwithstanding the apparent conflict between the witnesses, we are by no means prepared to say that the court erred in finding that transfer fraudulent and void, nor even that we should have found differently upon the same testimony.

We do, however, for the reasons hereinbefore stated, find that there was error in sustaining the demurrer to the additional answer of P. P. Lowe, and also in the rendition of the order or decree shown by the record.

Judgment reversed, and cause remanded.

SUTLIFF, C. J., and GHOLSON, BRINKERHOFF, and SCOTT, JJ., concurred.

EQUITY WILL RETAIN CASE AND DO COMPLETE JUSTICE, TO AVOID MULTIPLICITY OF SUITS: *Hall v. Delaplaine*, 68 Am. Dec. 57; *Treadwell v. Salisbury Mfg. Co.*, 66 Id. 490, note 501; *Whipple v. Farrar*, 64 Id. 90.

RIGHT TO BETTERMENTS: See *Livermore v. Boutelle*, 71 Am. Dec. 706; *Penn v. Halsey*, 68 Id. 597, note 603.

WHEN DEFENDANT MAY DENY ON INFORMATION AND BELIEF: *Humphreys v. McCall*, 70 Am. Dec. 621, and extensive note 625 et seq.

BILL BY CREDITOR TO SET ASIDE FRAUDULENT CONVEYANCE, necessity of judgment, and execution returned unsatisfied, to maintain: See *Heyneman v. Dannenberg*, 65 Am. Dec. 519, and note 521; *Grimsley v. Hooker*, 67 Id. 227; *Green v. Kornegay*, Id. 261. The case of *Gormley v. Potter*, 29 Ohio St. 599, was an action by a judgment creditor, who had levied on land fraudulently conveyed by the judgment debtor, to set aside the fraudulent conveyance. The action was not in the nature of a creditor's bill to reach equities of the judgment debtor, and founded on section 458 of the Ohio code, as was the principal case, and therefore it was not necessary to aver that the judgment debtor had not personal or real property, subject to levy on execution, sufficient to satisfy the judgment.

THE PRINCIPAL CASE IS CITED to the point that under section 313 of the Ohio code, both the party disqualified and the adverse party referred to must be parties to the record, and adversely interested in the determination of the issues of fact, and they must be so related to the action and the issues at the time of the trial; but it matters not whether they stand upon the same or opposite sides of the record: *Hubbell v. Hubbell*, 22 Ohio St. 221; and also to the point that the appellate court will not add to the statute concerning the competency of witnesses a disqualification not already specified, notwithstanding its propriety: *Cochran v. Almack*, 39 Id. 317, 319.

McDERMOTT v. STATE.

[18 OHIO STATE, 322.]

EVIDENCE OF AGREEMENT FOR SEXUAL INTERCOURSE WITH THIRD PERSON, made by prosecutrix on the day of the commission of a rape upon her, is inadmissible on the trial of an indictment for the rape.

GENERAL CHARACTER OF PROSECUTRIX FOR CHASTITY IS IN ISSUE IN PROSECUTIONS FOR RAPE, but particular acts of lewdness with persons other than the accused cannot be proved on the trial: First, because she is presumed to be unprepared to disprove such specific accusations without previous notice; and secondly, because it would create collateral issues, indecisive of the guilt or innocence of the accused, but well calculated to embarrass and mislead the jury.

ALLUSIONS TO SPECIFIC REPORTS OF IMPROPER INTIMACY OF PROSECUTRIX WITH THIRD PERSONS made on a trial for rape by the witnesses of the accused, without objection from the prosecution, do not authorize the prosecution to introduce evidence contradicting the truth of such reports. The issue is not whether a bad reputation of the prosecutrix for chastity is deserved, but whether it is generally accredited.

INDICTMENT for rape upon one Sarah Helme. The opinion states the case.

George M. Tuttle, for the plaintiff in error.

James Murray, attorney-general, for the state.

By Court, PECK, J. The plaintiff in error was tried by a jury in Trumbull common pleas, found guilty of a rape upon one Sarah Helme, and sentenced to the penitentiary. He now seeks to reverse that conviction and sentence, upon two principal grounds.

1. For error in excluding from the jury testimony offered by him that said Sarah, while on the cars, on her way to the town of Warren, where the ravishment is said to have occurred, agreed with a third person to meet him on a future day in Youngstown, and have sexual intercourse with him there; and also that she proposed to such third person that if she did not meet her husband in Warren, she would go with him to some place in that town. on the same night, for a like lascivious purpose.

We see no error in the exclusion of this testimony by the court. This court in *McCombs v. State*, 8 Ohio St. 643, have already decided, upon full consideration, that in prosecutions for rape, the character of the prosecutrix for chastity cannot be impeached by evidence of particular acts of unchastity with persons other than the accused, and also that evidence of such other instances is not admissible on the trial. If proof of the act itself is not admissible, it is difficult to give a reason for permitting proof of an agreement to commit the act. The reason which excludes proof of the act applies with still greater force to the mere agreement to do it.

We have been furnished with a very elaborate argument in favor of its admissibility, as tending to show the awakened desires and lascivious propensities of the prosecutrix shortly prior to the alleged assault, thereby lessening the probabilities that it was consummated forcibly and against her will. It by no means follows that a desire to have sexual intercourse with one person tends, legitimately, to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much the most probable; but however this may be, the introduction of such proof is opposed to the well-settled rules of evidence: See cases cited in *McCombs v. State*, 8 Ohio St. 643.

2. It is said that the court also erred in admitting testimony offered by the state, and objected to by the plaintiff in error, to disprove the truth of certain specific reports in regard to

said Sarah, alluded to by witnesses of plaintiff in error, while deposing as to her general character for chastity.

Several witnesses were examined, on the part of the accused, as to the general character of the prosecuting witness for chastity. Some of the witnesses first examined, in their cross-examination, and others subsequently called, in their examination in chief, spoke of certain specific reports in circulation of her improper intimacy with Andrew Pritchard, and also with Levin Arnold. While others still do not appear to have, in any way, referred to such specific reports, but stated they had the means of knowing her general reputation for chastity, and that it was bad. There does not appear to have been any objection to the proof thus given; but the prosecuting attorney, to rebut it, called Andrew Pritchard and Sarah Helme, offering to prove by them that the specific reports of such improper intimacy between them, and also between the said Sarah and Levin Arnold were, in fact, untrue. The plaintiff in error objected to this proof, but his objection was overruled, and they thereupon testified that there had never been any improper intimacy between said Sarah and either of said persons.

The general character of the prosecutrix for chastity is, as we have seen, properly in issue in such prosecutions; but particular acts of lewdness with persons other than the accused could not be proved on the trial. First, because she is presumed to be unprepared to disprove such specific accusations, without previous notice; and secondly, because it would create collateral issues, indecisive of the guilt or innocence of the accused, but well calculated to embarrass and mislead the jury. The last reason applies with equal force to the testimony objected to by the plaintiff in error. It was an attempt by the prosecutor to rebut proof of general reputation, by proving that some of the reports prejudicial to Sarah Helme, and which, doubtless, contributed to her bad reputation, were false and defamatory. Such testimony would create collateral issues as to the real truth or falsity of the reports, but would not disprove that such reports were in general circulation, nor that they were generally accredited by the community. No argument in favor of its admissibility can be drawn from the fact that these specific reports were stated by the witnesses of the accused. They were not called for by him, nor even stated by any of his witnesses in chief, until after their existence had been proved on the cross-examination of the prosecuting at-

torney, and then witnesses very naturally alluded to reports already in proof in justification of their estimate of her bad reputation. No evidence was offered to prove that the reports were true in fact; nor was any objection made to their introduction, by the prosecuting attorney.

The introduction of illegal testimony, without objection, does not authorize the party failing to object to introduce similar proof, and much less when, as in this case, its introduction would create an additional collateral issue as to the truth of the report itself.

The issue presented by proving her general reputation for chastity bad, was, not that such reputation was deserved, but that it was generally accredited. It was competent, therefore, for the state, upon examination, to ascertain from the witnesses their means of knowing her general reputation; the origin and character of any and all reports prejudicial to her; the extent to which those reports had prevailed; the time when and the persons from whom the witnesses heard them; and in short, everything which reflects upon a nature and general prevalence of the reputation imputed to her; but for the sole purpose of showing that, in fact, no such general reputation was prevalent in the community. The jury would thus be put in possession of all the facts in regard to the existence and extent of such reputation, and be able to determine how far it affected her credibility, and disproved the charge which she had preferred.

We are, therefore, of the opinion that the court below erred in admitting the testimony of Andrew Pritchard and Sarah Helme, in regard to the intercourse between them, as set forth in the bill of exceptions; and for this reason, the judgment is reversed, and the cause remanded to the court of common pleas for further proceedings.

SUTLIFF, C. J., and GHOLSON, BRINKERHOFF, and SCOTT, JJ., concurred.

IMPRISONMENT OF PROSECUTRIX ON TRIAL FOR RAPE: See note to *Smith v. State*, 80 Am. Dec. 368, treating this subject, and citing the principal case. The principal case is cited to the point that evidence of specific acts of unchastity on the part of a prosecutrix for rape, are inadmissible: *Strang v. People*, 24 Mich. 7. In *Pittsburgh etc. R'y Co. v. Ruby*, 38 Ind. 314, it was held that for the purpose of showing negligence in the officers of a railroad company in employing incompetent, negligent, or unskillful employees, specific acts of negligence or unskillfulness of such employees known to the officers of the company may be proved. The principal case was cited by counsel as an authority contrary to this proposition, but it was held inapplicable by the court.

CALLEN v. ELLISON.

[12 OHIO STATE, 443.]

JURISDICTION OF CAUSE ARISES OUT OF SOME RIGHT OR CLAIM to a thing within the territorial jurisdiction of the court, or out of some controversy between parties involving the claim of one or the other for the performance of some act, as the payment of money, the transfer of property, or the doing, or omission, or forbearance to do some act, which controversy the court is invested with authority to decide.

JURISDICTION OF PERSON IS ACQUIRED BY PERSONAL NOTICE OR SERVICE OF PROCESS; and other modes have been substituted by express provision of law, or the practice of courts, as publication, notice to the agent or attorney of the party, or an appearance for him by one of the attorneys of the court.

WAIVER OF PROCESS, OR AUTHORITY TO WAIVE IT, as shown by the evidence, must be decided upon by the court, and its decision may be express upon the record, or may be necessarily implied from the action of the court.

DECISION OF COURT OF GENERAL JURISDICTION UPON QUESTION OF SERVICE OF PROCESS upon party, or of waiver thereof, is conclusive, and not subject to collateral attacks in domestic tribunals.

JUDGMENT OF COURT OF GENERAL JURISDICTION CANNOT BE COLLATERALLY IMPEACHED, on the ground that the court had no jurisdiction of the parties defendant, where the record shows a finding by the court that the defendants, by C., their attorney, came into court, and by virtue of his power of attorney filed in the court, confessed judgment for the defendants for the sum of, etc., notwithstanding the power of attorney on file was not executed by some of the defendants, who were in fact, at the time, married women; for the power of attorney is no part of the record, and the finding shows the existence of jurisdiction.

LEGAL EFFECT OF JUDGMENT UNDER STATUTE TO BIND LANDS OF DEFENDANT, and subject them to sale, cannot be impeached collaterally by averment, and proof that the defendant was a married woman; and a sale of lands thereunder is valid.

SUIT for partition of land by the heirs at law of Andrew Boyd, deceased, against William Ellison. The plaintiffs claimed under a patent issued to them as the heirs of Andrew Boyd. The defendant claimed under a deed from the purchaser of the land at a sale on an execution issued on a judgment confessed against the plaintiffs by virtue of a power of attorney to confess judgment executed to one George Collins, by some but not by all of the plaintiffs. The action in which the judgment was confessed was instituted by one Bowman, the administrator of Andrew Boyd, deceased, against his heirs, the present plaintiffs, and was brought to recover an amount paid by the administrator to the heirs above what they were entitled to. The case is presented on an agreed statement, the questions arising thereon having been reserved for the decision of this court.

J. H. Thompson, and Wells and McFerron, for the plaintiffs.

E. P. Evans, for the defendant.

By Court, GHOLSON, J. The remark is frequently found in judicial opinions that to give validity to the judgment of a court, there must be jurisdiction of the cause and of the person. Jurisdiction of the cause arises out of some right or claim to a thing within the territorial jurisdiction of the court; or out of some controversy between parties,—involving the claim of one or the other, for the performance of some act, as the payment of money, the transfer of property, or the doing, or omission or forbearance to do some act,—which controversy the court is invested with authority to decide. When a court is moved by one party to enforce a claim, or decide a controversy, and for that purpose brings before it the other party, this is obtaining jurisdiction of the person. Jurisdiction of the person is properly acquired by personal notice, or service of process; but other modes have been substituted by express provision of law or the practice of courts, as publication, notice to the agent or attorney of the party, or an appearance for him by one of the attorneys of the court.

A suit is “the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, ‘the being put in possession of that right whereof the party injured is deprived.’ The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be ‘the lawful demand of one’s rights’; or as Bracton and Fleta express it, in the words of Justinian, ‘Jus prosequendi in judicio quod alicui debetur.’ Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right. To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptance of language, to continue that demand”: Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. 264-407.

When process is instituted,—when on a demand for it in the prescribed mode, the process of the court is issued,—the steps taken under that process must be matter proper for the consideration of the court. The court must determine whether the suit is prosecuted, whether the demand for the thing to

which a right is asserted is continued. So, if it be claimed that process has been waived, the fact of waiver or the authority to waive, as shown by the evidence, must be decided by the court. This determination or decision may be express on the very point, as by an assertion on the record that the process has been served, or that the party has appeared by an attorney, or it may be necessarily implied in the action of the court upon the demand of the party. The determination or decision that a party has been served with process, or that he has given authority to waive process, if in truth he has not been served or given such authority, is a determination or decision, when he has had no opportunity to be heard. Hence the right to show, in opposition to the record of such determination or decision, the truth by evidence has been claimed, as required by the principles of natural justice. If the court act at all upon the question whether a party has been served with process, or has authorized an appearance in the absence of such party, then the decision must be made at the risk of an incorrect conclusion. And it would be absurd to require notice of such inquiry, as that would involve a similar inquiry whether there was notice of that notice. The court must act upon the demand for which process has been instituted, either with or without inquiry into the fact whether such process has been served. That there should be no inquiry that a judgment by default should be rendered without inquiry into the fact whether the process has been served on the defendant, cannot, with any propriety, be claimed. If, then, the inquiry should be made, what effect is to be given to the determination or decision? It is obligatory, unless impeached or set aside in the mode prescribed as to other decisions of the court, or it may be disregarded as null and void whenever brought in question upon allegation and proof that the party, in truth, had no notice or opportunity to be heard? Here arises a conflict between principles of policy, which require the former conclusion, and principles of natural justice, which lead to the latter; and as might be expected in cases of such conflict, the decisions of courts have differed.

The decisions may, to some extent, be reconciled by classifying the cases, in view of the well-known distinction between courts of general and courts of special and limited jurisdiction, and of the difference between domestic judgments and the judgments of courts of general jurisdiction, under consideration falls, the decisions in this state, though perhaps not

entirely uniform or consistent, do undoubtedly show a strong inclination to sustain such judgments against indirect or collateral attacks on their validity and effect. It appears to have been thought that natural justice is satisfied when notice is required, and an impartial tribunal established to ascertain and determine whether it has been given. Nor can it be properly said that such a tribunal has jurisdiction because it has so decided. Its decision is binding because it was authorized to make it, and because public policy, and the respect due to the sovereignty, requires that the decision should be regarded, while it remains on the record unimpeached and unreversed. We feel inclined to go as far in sustaining the validity and effect of the judgments of courts of general jurisdiction as our predecessors have gone, and no disposition to permit an indirect attack upon them in any case not authorized by former decisions. And looking at those decisions, we are satisfied that, without disturbing any of them, we are at liberty to sustain the judgment under consideration in this case. In the case of *Lessee of Fowler v. Whitman*, 2 Ohio St. 270, 286, it is said to have "become established by a series of decisions in Ohio, that the finding of a court of general jurisdiction, upon a subject-matter properly before it, shall not be collaterally impeached; but while such finding is unreversed, it is conclusive of the matter as found." The finding in that, and in the previous cases there referred to, was upon the question of notice. In the case of *Moore v. Starks*, 1 Id. 369, 373, it was intimated, though no decision was made or required on the point, that there is a distinction between an express finding that notice had been given, and the necessary implication of such a finding, shown by the act of rendering the judgment. Whether such a distinction can be properly made, we need not decide. The point really decided in that case was, that where it affirmatively appears in the record that the defendant was not served with process or otherwise legally notified the judgment is void. This was the principle on which the court acted; whether it was properly applied, we are not required to say.

Regarding the above as the principles properly applicable to this case, in the record of the judgment now under consideration, we have this express finding of the court: "The defendants, by George Collins, Esq., their attorney, came into court, and by virtue of his power of attorney filed in this court, confessed judgment for the defendants, for the sum of,"

etc. Now, this finding not only entirely fails to show a want of jurisdiction, but shows its existence in positive and direct terms. It is claimed that a power of attorney found among the papers of the case shows that it was not executed by some of the defendants, and that in truth some of the defendants were married women, and could not legally execute a power of attorney. But the power of attorney found among the papers is not a part of the record, neither in fact nor certified to us as such. It was not intended to be made so, either by the law, or the action of the court. The object of filing the power of attorney on which the judgment was predicated was not that by it, or by proof connected with it, the judgment of the court might be shown to be without jurisdiction and void, but to furnish the parties affected by the judgment ready means to apply to the court itself to correct any irregularity or error. Had such an application been made, and it had been shown that by mistake or inadvertence a judgment had been rendered against parties who had not executed the power of attorney, or who were married women, there can be no doubt the judgment would have been set aside.

The other point which has been presented for our consideration in this case is novel, but we think is answered by the general principle as to the validity and effect of a judgment, and the provision of the statute subjecting the real estate of a debtor to sale under a judgment and execution. The judgment was rendered against Rebecca Callen, who then owned the land in controversy, who was in fact a married woman, but whose coverture is not shown by the record, was not relied on as a defense, or urged as an objection to the rendition of the judgment. It is not claimed and certainly is not law, that a judgment against a woman is void, if in fact she was at the time a married woman. The judgment, then, was a valid judgment against Rebecca Callen.

The question then arises, whether it bound her real estate so as to authorize its sale, notwithstanding the restrictions upon the alienation by married women of their real estate. The statute (2 Chase, 1297) shows what was the legal effect in this respect of the judgment against Rebecca Callen. "The lands and tenements of a debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered, in all cases where such lands lie within the county where the judgment is entered; and all other lands, as well as the goods and

chattels of the debtor, shall be bound from the time they are seized in execution." The sheriff was authorized to sell the lands under an execution, and to make to the purchaser "as good and sufficient a deed of conveyance for the lands and tenements so sold, as the person or persons against whom such writ or writs of execution were issued, might or could have made for the same, at, or any time after said lands became liable to said judgment."

The judgment shows that Rebecca Callen was a debtor. The legal effect of the judgment was to bind her lands, and subject them to sale under execution. This legal effect cannot be destroyed by averment and proof that she was a married woman. Even a technical difficulty, which might have been suggested under the provision of the statute last quoted, had Rebecca Callen been sued alone, is obviated by the fact that her husband was also a defendant, and both must be regarded as having constructively joined in a conveyance to the purchaser. Nor do we think, assuming, as is claimed by the defendant in this case, and as we may assume in support of the validity and effect of the judgment, that the debt for which the judgment was rendered against the husband and wife was really the debt of the wife, there is any hardship in the case.

A married woman has no power to convey or dispose of her land, except as provided by law. Nor at common law, could lands be sold under execution for payment of debts. But when the law authorized lands to be sold for the payment of debts, no reason can be perceived why the lands of a woman who, when sole, has contracted a debt, or after marriage, incurs a personal liability, should not be liable as the lands of any other debtor, and sold on a judgment against her and her husband. But it is enough in this case to say that we cannot permit the plaintiffs to vary or destroy the effect of the judgment by proof that they, or those under whom they claim, were married women at the time of its rendition.

Looking at all the facts contained in the agreed statement, and giving them what we regard to be their proper legal effect, we think we are bound to render a judgment for the defendant.

Judgment for defendant.

SUTLIF, C. J., and PECK, BRINKERHOFF, and SCOTT, JJ., concurred.

DOMESTIC JUDGMENT OF COURT OF GENERAL JURISDICTION cannot be collaterally attacked where no want of jurisdiction is apparent on the record, for in such cases the jurisdiction is conclusively presumed: *Coit v. Haven*, 79 Am. Dec. 244, and note 249. The principal case is cited to the point that in the case of domestic judgments of courts of general jurisdiction, where it appears from the record that the court has positively found the fact or facts on which its jurisdiction legally rests, the jurisdiction may not afterwards be collaterally questioned: *Hammond v. Davenport*, 16 Ohio St. 182; *Wehrle v. Wehrle*, 39 Id. 366; but it is also said that the jurisdiction of a court is a matter into which inquiry may be made even in collateral proceedings, where the record contains no finding of facts expressly showing jurisdiction: *Scobey v. Gano*, 35 Id. 553, citing the principal case.

JURISDICTIONAL FACTS, SUCH AS SERVICE OF WRIT, ARE CONCLUSIVELY PRESUMED in case of a judgment of a domestic court of general jurisdiction, unless the record itself shows the contrary: *Coit v. Haven*, 79 Am. Dec. 244, note 249.

THE PRINCIPAL CASE IS CITED to the point that persons who have signed a mortgage, which appears to be duly acknowledged, may set up in defense to an action to enforce the instrument that they did not appear before the justice of the peace and acknowledge its execution: *Williamson v. Cowhadden*, 36 Ohio St. 666.

HADLEY v. CLINTON COUNTY IMPORTING Co.

[13 OHIO STATE, 502.]

DECLARATIONS OF VENDOR AT TIME OF SALE, LIMITING EFFECT OF STATEMENTS in an advertisement concerning the article sold, are admissible in an action by the vendee for a breach of warranty.

NOTICE TO ONE OF TWO JOINT PURCHASERS CONCERNING TERMS OF SALE is notice to both.

IT IS ERRONEOUS TO INSTRUCT THAT RULE OF CAVEAT EMPTOR APPLIES TO CASE, if there is any evidence in the case which requires a determination by the jury of the question whether there was fraud in the sale.

INSTRUCTION THAT RULE OF CAVEAT EMPTOR APPLIES TO CASE, accompanied by general remarks concerning fraud in the sale, is calculated to mislead a jury in a case where there is evidence of fraud proper to be considered by the jury.

GOOD SENSE AND LAW MORE READILY AUTHORIZES FINDING THAT VENDOR IS BOUND TO DISCLOSE a latent intrinsic defect in the article sold more peculiarly within his knowledge than extrinsic facts affecting its value as to which the means of knowledge was equally accessible to both parties.

WHETHER OR NOT FAILURE OF VENDOR TO DISCLOSE MATERIAL LATENT DEFECT known to the vendor and unknown to the vendee constitutes a fraud, is generally a question of fact upon which a jury should be allowed to pass.

OMISSION TO DISCLOSE LATENT AND MATERIAL DEFECT known to the vendor and unknown to the vendee, is merely evidence of fraud, the effect of which the circumstances may strengthen or destroy.

FRAUDULENT INTENT ON PART OF VENDOR IN IMPROPERLY CONCEALING MATERIAL FACT to the damage of the vendee, will be presumed in an action by the vendee for damages.

INSTRUCTION THAT CONCEALMENT BY VENDOR OF MATERIAL LATENT DEFECT, known to vendor and unknown to vendee, constitutes fraud on the part of the vendor, is erroneous, since this does not constitute fraud as a matter of law, but is merely evidence of fraud.

ACTION for damages alleged to have been sustained from a defect in a cow bought by the plaintiffs of the defendant for \$1,050. The defendant, it was claimed, was liable for the damages either because of a warranty shown by representations, or on account of a failure to disclose the defect. The sale was at public auction. The printed advertisement of the sale set forth that the stock offered for sale had been carefully selected from the herds of the most celebrated breeders in England. The stock was specifically described, and the cow sold to the plaintiffs was described as "No. 10, Princess, roan, calved in 1852, bred by R. Thornton Stapleton, got by Lord Newton, dam Kate, by Isaac (9239)," etc.; and the pedigree, as contained in the herd-book, was shown at length. The advertisement was conspicuously posted where the sale was to take place, and was read by the auctioneer at the sale. It was proved by the plaintiffs that the cow Princess was four years old or more on the day of the sale, instead of being calved in 1852, which would have made her only about two years old. The defendant offered to prove that the president of the company publicly stated that while the company had full confidence in the skill of their agents who selected the cattle, and in the honor and integrity of the breeders who had sold them, the bidders would have to judge for themselves, for the company warranted nothing. The plaintiffs objected to this evidence, as contradictory of the printed advertisement, and their objection being overruled, excepted. Evidence was then introduced to show that the plaintiffs did not hear the statement made by the president; but it was proved that one of the plaintiffs did hear the statement, but did not hear it distinctly, or understand it correctly, and that he afterwards bid in the cow. The plaintiffs requested the instruction that if the company would avoid its printed warranty that the cow was calved in 1852, it must show that the plaintiffs had actual knowledge that the company had determined not to so warrant the animal. The court refused this instruction, and charged the jury that if the notice of the fact that the president had announced that the company would not warrant was brought home to either of the plaintiffs, it would be notice to both; and if either of them heard any part of the

president's announcement from the stand, or heard him call attention to the terms of the sale, it was his duty to pay attention, and to hear the whole statement truly, and as it was in fact made; and this would be sufficient to charge both plaintiffs with what was actually said, and to make said announcement a part of the terms of the sale. Evidence was also introduced tending to show that the cow had been sold and purchased for a breeder; and that previous to the sale the company had taken from the cow, by artificial means, a calf which had the appearance of being dead for several weeks prior to its delivery, and which would, in the opinion of the plaintiffs and other breeders, greatly impair, if not totally destroy, her breeding properties, and in the opinion of other breeders, would not injure or impair her capacity as a breeder; that this fact was not made known, and could not be discovered by external examination of the cow; that the plaintiffs purchased in ignorance of the fact; that the cow, after bearing two calves, died from disease of the kidneys, and upon examination, her generative organs were found to have been injured. The plaintiffs, in respect to this evidence, asked the instruction which is stated in the opinion. The court refused this instruction, and did charge that the rule of *caveat emptor* was applicable to this case; that the seller might be silent, and be safe; that if he did nothing more than make remarks of simple commendation or praise, he was safe; that he might let the buyer cheat himself *ad libitum*, but not actually, by word, act, or artifice, assist him in cheating himself; if the seller was simply silent in the case, and did or said nothing to lead the buyer astray, or to prevent examination or inquiry, though it might amount to moral fraud, yet it would not amount to such fraud as the law takes cognizance of; that the law recognized the necessity of leaving men to take some care of themselves in their business transactions. To the refusals of instructions, and to the instructions given, the plaintiffs excepted. Verdict and judgment for the defendant, and petition in error filed by the plaintiffs.

D. Linton and R. B. Harlan, for the plaintiffs in error.

B. Hinkson, for the defendant in error.

By Court, GHOLSON, J. The objection of the plaintiffs to the testimony which showed a declaration of the vendors at the time of the sale, limiting the effect of the statements in the advertisement, was untenable. At the time of the decla-

ration, there was no contract. The advertisement and the declaration are to be taken together as a proposal to contract, and we know of no rule, which, as to the sale in question, would prevent such a proposal being partly written and partly verbal.

We think there was no error in the refusal of the first charge asked by the plaintiffs, and no error to their prejudice in the charge given in connection therewith. The plaintiffs cannot justly claim an advantage from which one of them was excluded by his knowledge of the facts. It would be difficult to maintain that a purchaser at a public sale, who so far complies with its terms as to take the property and pay for it, asking no express warranty, could be permitted to show that he did not inform himself of what were the actual terms of the sale, and derive advantage from the want of full and accurate information.

In refusing the second charge asked by the plaintiffs, the court first saying that "the rule of *caveat emptor* was applicable to this case," gave in charge to the jury, as also applicable to the facts of the case, the substance of a passage in 1 Parsons on Contracts, 578. The full passage is as follows: "If the seller knows of a defect in his goods, which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought, perhaps, on moral grounds, to avoid the transaction. But this moral fraud has not yet grown into a legal fraud. In cases of this kind, there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit.

"And if the seller be not silent, but produce the sale by means of false representations, there the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be active fraud. The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent, if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. The distinction

seems to be,—and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions,—the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself.”

To understand the proper meaning and application of this passage, it is important to see in what connection it is found. In the preceding paragraph the author had referred to the rule of *caveat emptor* as prevailing in England and in this country, but having some exceptions and qualifications; and then, and immediately preceding the passage quoted, he says: “One important and universal exception is this: the rule never applies to cases of fraud; never proposes to protect a seller against his own fraud, nor to disarm a purchaser from a defense or remedy against a seller’s fraud. It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule.”

It is evident that the passage which follows is intended to point out some of the marks by which fraud may be known, and this is done in general language. The author could not, in so few words, cover the whole ground, or give a complete description, and certainly did not intend to attempt a definition of fraud, from which it might be determined whether it existed or not in particular cases. It is evident also that these marks, by which fraud may be distinguished and known, are proper subjects of inquiry only when the object in view is to ascertain whether the case under consideration comes within the exception which fraud creates to the application of the rule of *caveat emptor*. It was not necessary to refer to them, if the court was correct in the declaration to the jury that the rule was applicable to this case. On the contrary, if there was any evidence in the case which properly required a determination by the jury of the question whether there was fraud in the sale, then the court erred in making that declaration to the jury.

We think there was such evidence; and that the declaration to the jury that the rule of *caveat emptor* applied to the case, accompanied by the general remarks shown in the bill of exceptions, was calculated to mislead the jury. It is expressly stated in the bill of exceptions, that the evidence tended to show that the cow, the subject to the contract, “had been sold and purchased for a breeder, with a view to the improvement

of the plaintiffs' herd of cattle." This is clearly shown from the advertisement and all the surrounding circumstances, particularly from the price paid, \$1,050. The vendors cannot be said to have been merely silent, and the jury were entitled to inquire whether the whole truth as to the breeding qualities of the cow should have been disclosed.

Again, as to the duty of the vendors to have disclosed the alleged defect in the cow, it was an important inquiry whether the means of knowledge on the subject was equally accessible to both parties. This is shown in the note to the same passage in Parsons on Contracts, and is said to be "the principle of the text," though this certainly is not very obvious. It is said that "*Laidlaw v. Organ*, 2 Wheat. 178, is the leading case on this subject in America," and that "*Kuitzing v. McElrath*, 5 Pa. St. 467-470, also well illustrates the principle of the text, that where the means of knowledge is accessible to both parties, each must judge for himself, and it is neither the duty of the vendor to communicate to the vendee any superior knowledge which he may have of the commodity, nor of the vendee to disclose to the vendor any facts which he may have, rendering the property more valuable than the vendor supposed." It was said in the latter case, that "the only practicable rule for all cases seems to be that stated by Chief Justice Marshall, that where the means of knowledge is equally accessible to both parties, each must judge for himself."

This very principle, and the character of the cases by which it is illustrated, suggests a distinction between the extrinsic circumstances affecting the market value of the article sold and intrinsic defects; and it is said by the same author, in his second volume (page 273): "The rule seems to be that a concealment or misrepresentation as to extrinsic facts, which, by affecting the market value of things sold, or in any such way affects the contract, are not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. But it is perhaps enough to say of this that a fraud relating to external and collateral matters is treated by the law with less severity than one which refers to things internal and essential." In other words, good sense and the law will more readily authorize the finding that there was an obligation to disclose a latent, intrinsic defect in the article sold, more peculiarly in the knowledge of the vendor, than extrinsic facts affecting its value, as to which the means of knowledge was equally accessible to both parties. The impor-

tant point in any case where there is a material latent defect, known to the vendor and unknown to the vendee, is whether, under the circumstances, the omission to disclose it constituted a fraud. It may or may not, under the circumstances, be a fraudulent act, giving a right of action for deceit. Whether it be so is, at least generally, a question of fact upon which the jury should be allowed to pass, and as the diversity in the circumstances of cases is infinite, and any rules to aid the jury in their inquiry apply to classes of cases, care should be taken that the circumstances of the case show that it may properly fall under the class to which the rule given in charge to the jury applies.

Finding, in accordance with these views, that there was error in the charge given to the jury, a new trial must be had; and as, on that trial, the question may again arise as to the right of the party to the charge asked, it is proper that it should be decided. The plaintiffs asked the court, in view of the evidence stated in the bill of exceptions, to charge the jury "that if they found that the breeding qualities of said cow were materially affected by taking from her said dead calf, and her value was materially diminished thereby; and that if said defect could not be discovered on examination, and the plaintiffs were entirely ignorant of the same; and if the defendants knew of said defect at the time of the sale, and failed to disclose the same, knowing that the plaintiffs were purchasing her for a breeder, and to improve their stock of cattle,—then and in that state of the case the defendants would be guilty of practicing a fraud upon the plaintiffs, for which they would be liable to the plaintiffs in this action." The statement of evidence which precedes the charge shows that witnesses differed as to the effect on the breeding qualities of the cow of the taking from her the dead calf; but there appears to have been no dispute as to the occurrence of the act, and a knowledge thereof on the part of the defendants. The doubt whether it caused a material defect in the breeding qualities of the cow might be important in deciding whether the omission to disclose the fact was fraudulent; but the plaintiffs had a right to ask a charge, on the assumption that their view of the tendency of the evidence was correct. The charge, then, as asked, might properly assume that there was a defect materially affecting the breeding qualities of the cow, known to the vendors, they also knowing that the cow was being purchased for a breeder; that this defect could not be discovered on examination was

unknown to the vendees; and that there was a failure to disclose it at the time of the sale. And the question was, whether as matter of law, the jury finding these facts to exist, there was fraud in the sale.

There certainly are respectable authorities which seem to sustain the right of the plaintiffs to this charge. Thus, in the recent case of *Hoe v. Sanborn*, 21 N. Y. 552, 555 [78 Am. Dec. 163], in which the principles of law on the subject of implied warranties are discussed, it is said: "It is a universal doctrine, founded on the plainest principles of natural justice, that whenever the article sold has some latent defect, which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong that the courts will presume its existence without proof; and in this case the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed."

It is said in Story on Sales, sec. 179, that any concealment by the vendor of latent defects, known to him to exist, by which the vendee could not, by the exercise of proper diligence, have discovered, will be a fraud upon the vendee, which will avoid the contract. There are other American authorities to the same effect.

In the work of Addison on Contracts, p. 223, occurs these passages: "But the law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, and who does not affirm that the article is fit for any particular purpose, any warranty, or undertaking beyond the ordinary promise that he makes no false representation calculated to deceive the purchaser, and practices no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods. And on the sale and transfer of wares and merchandise, if nothing is said as to the character or quality of the thing sold, the buyer takes the risk of all latent defects unknown to the seller at the time of the execution of the contract of sale; all the seller answers for is, that the article is, as far as he knows, what it appears to be." And see page 220 and cases cited.

Doubtless, the cases in which it has been held that a vendor was bound to disclose a latent and material defect in the thing sold, known to him and unknown to the vendee, were each of them correctly decided. The error has been in deducting a general rule of law applicable in all cases of a like character, from the conclusion upon the evidence in a particular case. This error is apt to occur when similar cases are of frequent occurrence. The effect of the retaining possession of property sold by a person indebted, on the question whether the sale was fraudulent as to creditors, furnishes an apt illustration. It is really and is now generally held to be evidence of fraud; but it had been held in England, and is still held in some courts in this country, to be fraud in law.

So it may be said of the omission to disclose a latent and material defect, known to the vendor and unknown to the vendee. It is evidence of fraud,—evidence the effect of which the circumstance may strengthen or destroy. It rarely happens that a sale occurs, the circumstances attending which throw no light on the inquiry as to the effect either of a misrepresentation or concealment. They appear to be governed by like principles. "I make no distinction," says Bayly, J., in *Early v. Garrett*, 9 Barn. & C. 928, 932, "between an active and a passive communication. If a seller fraudulently conceal that which he ought to communicate, it will render the contract null and void." In either case, there must be fraud, and to decide whether there be fraud, knowledge of the fact misrepresented or not communicated is most important. In both, there must be an intention to deceive; but this intention may be imputed, and in some cases will be conclusively imputed, upon the principle that a party must be presumed to intend the necessary consequences of his own acts or conduct. If a vendor omits to disclose a latent defect, which it was under the circumstances his duty to disclose, and by such omission receives, as purchase-money, many times the real value of the article, he cannot say, in answer to the action of the purchaser for a deceit, that none was intended.

In the case of *Wilde v. Gibson*, 1 H. L. Cas. 605, where the decision of the very learned judge of the court below, Knight Bruce, was reversed, there was an inquiry into the principles applicable in cases of this description. It was a bill to rescind an executed contract; the fraud alleged was the concealment of a matter alleged to be essential, and the question was expressly held to depend on the same rules which govern an

action for deceit. It was said by the lord chancellor: "There can be no direct personal fraud without intention, and there can be no intention without knowledge of the fact concealed or misrepresented." "If you mean," says Lord Campbell, "by fraud, an intention to injure the party to whom the representation is made, or to benefit the party who makes the representation, there may be an action of deceit without fraud; but there must be falsehood; there must be an assertion of that which the party making it knows to be untrue; the *scienter* must be either expressly alleged, or there must be an allegation that is tantamount to the *scienter* of the fraudulent representation, and this allegation must be proved at the trial. There must be a falsehood stated and proved. If that falsehood is stated without any view of benefiting the person who states the falsehood, or of injuring the person to whom the falsehood is stated, in one sense of the word you may say it is not fraudulent, but it is a breach of moral obligation; it is telling a lie; and if a lie is told whereby a third person is prejudiced, although there may be no profit to the person who tells it, and although no injury was intended to the person to whom it is told, but a benefit to a third person, it is clearly a breach of moral obligation, and is a fraud which will support an action of deceit": *Wilde v. Gibson*, 1 H. L. Cas. 633, citing *Foster v. Charles*, 7 Bing. 106; *Polhill v. Walter*, 3 Barn. & Adol. 123; *Corbett v. Brown*, 8 Bing. 37; and see *Thom v. Bigland*, 8 Ex. 725, 731; *Evans v. Edmonds*, 13 Com. B. 777.

It has been said that between the *allegatio falsi* and the *suppressio veri*, there is only this, that the disclosure, in order to constitute fraud, must be of facts which the seller was under an obligation to disclose: Smith on Contracts, 150, note; 1 Story's Eq. Jur., sec. 207; *Otis v. Raymond*, 3 Conn. 413. This obligation to disclose will be found to arise from something in the acts or conduct of the vendor in connection with the sale, doing something or saying something which, for want of the disclosure, is false and deceptive. The old adage applies, that half of the truth is a lie. It is in this view that the principles governing false representations become applicable, and as in the case of a false representation, a fraudulent intention in concealing the fact which ought to have been disclosed need not appear, it will suffice to sustain the action, if the fact having been improperly concealed, there was a falsehood to the defendants' knowledge which produced a damage to the plaintiff: *Thom v. Bigland*, 8 Ex. 725, 731; *Polhill v. Walter*,

8 Barn. & Adol. 114; *Collins v. Evans*, 5 Q. B. 820; *Ormrod v. Huth*, 14 Mees. & W. 651; *Railton v. Matthews*, 10 Clark & F. 934-994; *Blydenburgh v. Welsh*, Bald. 331-337; *Cornelius v. Molloy*, 7 Pa. St. 293, 299.

We have expressed these views to show, first, that the court properly refused the charge as asked, the facts on which the charge was predicated not constituting fraud as matter of law, but only evidence tending to establish fraud; and secondly, to strengthen the conclusion before stated, that the charge given was calculated to mislead the jury, and draw their minds from the points really in contest, as shown by the statements of the evidence.

In such a case as the present, and in response to the charge asked by the plaintiffs, the reference to the distinction between moral and legal fraud, and to the necessity that fraud, to give a right of action, should be active, required the explanation which is shown by the authorities cited. And we may add that looking at the evidence given, and the facts which, it is said, the evidence tended to establish, the matter in contest was, whether what occurred to the cow really produced the defect alleged, and whether under the circumstances it ought to have been communicated. This would naturally lead to the inquiry as to which there was a conflict; and in view of the purpose for which the cow was sold and purchased, it would, among persons ordinarily skilled and conversant in such matters, have materially affected her value for the purpose stated. If it would not, then the plaintiffs, whatever be their own views now as to what they would have done, have no right, their speculation having failed, to complain; for it may be that others, knowing the fact, would have given substantially the same price for the cow. On the other hand, if among persons ordinarily skilled and conversant in such matters, a knowledge of the fact would have materially affected the value of the cow, and prevented her sale, in view of the other circumstances in the case the jury might be properly asked by the plaintiffs to come to the conclusion that such a fact ought to have been disclosed.

The judgment in this case must be reversed, and the case remanded for further proceedings in the district court.

Judgment reversed.

SUTLIFF, C. J., and PECK, BRINKERHOFF, and SCOTT, JJ., concurred.

FAILURE OF VENDOR TO DISCLOSE LATENT DEFECT KNOWN TO HIM AND UNKNOWN TO VENDEE: *Hoe v. Sanborn*, 78 Am. Dec. 163, note 175; *Brown v. Gray*, 72 Id. 563, and note 566.

FALSE REPRESENTATIONS OF VENDOR MADE BEFORE SALE as affected by statement at the sale that the vendor does not warrant: See *Harris v. Mullins*, 79 Am. Dec. 320.

CAVEAT EMPTOR IS RULE OF SALES IN ABSENCE OF FRAUD OR WARRANTY: *Weiner v. Clement*, 78 Am. Dec. 411, and note 414.

QUESTIONS OF FACT MUST BE LEFT TO JURY and must not be removed from their consideration by instructions: Note to *State v. Whit*, 72 Am. Dec. 538 et seq.; *Booster v. Rogers*, 52 Id. 680; *Bank of Pittsburgh v. Whitehead*, 36 Id. 186.

ROBERTS v. THOMPSON.

[14 OHIO STATE, 1.]

WHERE ONE RECEIVES NOTE AS COLLATERAL SECURITY FOR EXISTING DEBT, GENERAL RULE IS that the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party, by reason of a want of such care and diligence, the law will compel him to make good the loss.

CASES OF PERSONS WHO RECEIVE NEGOTIABLE PAPER AS COLLATERAL SECURITY, ARE NOT GOVERNED by the strict rules of the commercial law, applicable to negotiable paper, but fall under the general law of agency, which must determine the rights and liabilities of the parties. However, if the parties make a special agreement, they will be bound by its terms.

PARTY TO WHOM HAS BEEN ASSIGNED, AS COLLATERAL SECURITY, PROMISSORY NOTE, payable on or before a certain date, under an agreement by which demand and notice of non-payment are waived, is under no obligation to demand or insist upon payment of the note before it becomes due. This is so, although the maker of the note expressed willingness to pay it, and the holder might have collected it by insisting upon payment.

THIS action was commenced by the plaintiff in error against the defendants in error to recover upon a promissory note for one thousand dollars, with interest, made by defendants to plaintiff. Plaintiff admitted the payment of one hundred dollars upon the note. Defendants claimed a further credit of \$572, upon the ground that when they made the note sued on, at plaintiff's request they transferred to him two notes made by J. H. Palmer, one being payable on or before April 1, 1857, and the other a year later. At the time plaintiff received these notes, he gave a receipt for them to defendant, who waived demand and notice of non-payment. Defendant then alleged that on April 1, 1857, Palmer was able and willing to pay the principal of the note which fell due on that day, and the interest on both; and that on that day he offered

to pay plaintiff \$672, but that he neglected and declined to receive more than one hundred dollars. The remaining facts appear from the opinion.

Goddard and Bunker, for the plaintiff in error.

Blocksom, for the defendants in error.

By Court, SCOTT, J. The general rule is, that where a party receives a note as collateral security for an existing debt, without any special agreement, the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party by reason of a want of such care and diligence, the law will compel him to make good the loss. Such cases are not governed by the strict rules of commercial law applicable to negotiable paper; but fall under the general law of agency, which must determine the rights and liabilities of the parties. But where there is a special agreement between the parties, they will be bound by such special agreement, and not by the general rule: *Lawrence v. McCalmont*, 2 How. 428; *Lee v. Baldwin*, 10 Ga. 208.

In the case before us, the collaterals were assigned and delivered on the 10th of April, 1856, at the time of executing the note which they were intended to secure, and which was payable two years after its date, but with interest payable annually. The notes assigned were negotiable in character, and counting days of grace, the first one would mature April 4, 1857; and the second, one year later; and they were each bearing interest, payable annually.

Evidence having been offered by the defendants on the trial, tending to prove the state of facts contemplated by the charge of the court, the jury was instructed that "if they were satisfied from the evidence that on the thirtieth day of March, 1857, the said Palmer offered to pay to the plaintiff the amount of the note, which, by its tenor, was payable on or before April 1, 1857, and was then able and willing to pay it, and that he would have paid it had the plaintiff insisted on the payment, and the plaintiff declined or neglected to receive it, though he neglected to receive it at the solicitation of said Palmer; and if they were satisfied from the evidence that Palmer had since become insolvent; and that the mortgage deed was not sufficient security in the sum of \$572 for all the notes described in it,—then that the jury should allow a credit to the defendants in this suit of the said sums of money which the said Palmer offered to pay, and which the plaintiff did not receive."

Neither the answer of the defendants, nor the evidence in the case, charged the plaintiff with actual fraud or intentional bad faith. It is nowhere intimated that he had reason to suspect the ultimate insolvency of Palmer; or that he was aware of the insufficiency of the mortgage security which Palmer had given to the defendants, and which they had transferred to the plaintiff. The charge of the court proceeds on no such supposition. Nor do the instructions given to the jury place the liability of the plaintiff on the ground of his duty to receive the amount of the notes held by him as collateral security, upon the legal tender of the same by the maker. The case stated by the court supposes that Palmer did not in fact desire to make payment, but that, having it in his power to make present payment, he expressed his willingness to do so, if insisted on by the plaintiff; and the jury was told, in effect, that though, as against Palmer, the plaintiff had then no legal right to demand payment, the note having still four days to run, yet that it was his duty, under these circumstances, to insist upon and thus obtain payment; and that his failure to do so constituted such want of proper care and diligence as would render him liable to the extent of the payment which he might have obtained for the loss occasioned by the subsequent insolvency of Palmer.

Do the instructions thus given truly present the law of the case? We think they do not.

It may properly be conceded that the plaintiff having received the notes in question as collateral security, his duty was not limited to their safe-keeping; but that he was bound so to conduct himself in regard to them, as by no fault of commission or of omission to prejudice the legal rights of his debtors from whom they were received. But even in the absence of any special agreement, we see no legal right of the defendants for the protection of which they could reasonably expect or require their assignee to demand and insist upon payment by Palmer, before the expiration of the time given by the express terms of the note. Having agreed with Palmer that he might make payment according to his own convenience, at any time not later than the 4th of April, was it the duty of their assignee and agent, without instructions, not only to demand, but to insist upon an earlier payment? It is clear that none of their legal rights were waived, or at all affected by this failure of the plaintiff to require, at Palmer's hands, more than the performance of his contract.

But the agreement of the parties to the assignment was, in this case, special. The notes assigned were not due, and the defendants, by the terms of their assignment, waived demand and notice of non-payment.

This assignment was an absolute guaranty of payment, and the plaintiff was thereby relieved from all obligation to demand payment when the note matured; and if so, much more was he under no obligation to demand and insist upon an earlier payment, even by the strict rules of commercial law governing ordinary indorsements.

Judgment of the court of common pleas reversed, and case remanded.

PECK, C. J., and GHOLSON, and BRINKERHOFF, JJ., concurred.

RANNEY, J., dissented.

WHERE CREDITOR HAS RECEIVED NOTES AS COLLATERAL SECURITY for his debt, unconditionally, without any instructions governing the course of collection, he is bound to take the necessary steps to perfect the liability of the parties, and if the security is lost, or rendered unavailable by his neglect, he must bear the loss. But the collection of notes pledged as collateral security may be made the subject of agreement, by which they are to be collected in a particular manner: *Pickens v. Farborough's Adm'r*, 62 Am. Dec. 723.

DUNLAP v. KNAPP.

[14 OHIO STATE, 64.]

PRIVATE ACTION WILL NOT LIE AGAINST SUPERVISOR OF HIGHWAYS for damages sustained from his neglect to keep a bridge in his district in repair.

THIS action was brought by Dunlap against defendant, whom he alleged to be supervisor of highways in Munson township, that he suffered a bridge in his district to decay and become unsafe; that plaintiff, not knowing of this fact, endeavored to cross this bridge with his wagon and team; that the bridge broke, and that his property was damaged in the sum of eight hundred dollars. Defendant's demurrer to this complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was sustained.

Forrist, for the plaintiff in error.

Thrasher, Durfee, and Hathaway, for the defendant in error.

By Court, PECK, C. J. It is undoubtedly true as a general rule, that when, by statute, the performance of a public duty is cast upon a public officer, and he willfully neglects to perform that duty, by which neglect another suffers some special damage, the person thus guilty is liable in an action on the case for such damages, in favor of the party injured, unless the statute creating the duty provides a peculiar and exclusive remedy; and that such private remedy is not taken away by the mere annexation of a penalty for the public wrong, recoverable by indictment or at the suit of a common informer.

But this, like all other mere general rules, is subject to exceptions, and among others, as ancient perhaps as the rule itself, is this, that where the duty is imposed by statute upon minor political organizations or *quasi* corporations without their consent, for purposes of public policy, and not for their benefit but that of the public at large, such omission of duty lays no foundation for the recovery of private damages, unless such recovery is expressly authorized by the statute.

The primary duty of keeping the public roads and bridges in this state in repairs is cast by the statute upon the townships in which they are located. The trustees are authorized to establish, alter, and vacate township roads, to lay off the township into suitable road districts, and to determine the number of supervisors. They are also directed to apply the funds arising from the county road tax to the building of bridges and repair of roads. All the male persons of the township, between the ages of eighteen and fifty-five, are required to perform two days' labor in each year upon the roads, at the call and under the direction of the supervisor; and in extraordinary exigencies, they may be required to labor an additional day. It is apparent, then, that the entire burden of keeping the roads in repair is cast upon the township, and the action of the trustees in the first instance, and of the supervisor in the second, are but so many instrumentalities provided by law for the performance of this duty by the people of the township, and the liability of the supervisor should be commensurate only with that of the township, for an omission of the duty he is thus delegated to perform. The statute which imposes the duty of repair upon the supervisor, and for that purpose permits the application by him, to a limited extent, of the labor and funds of the township, while it subjects him to a penalty for an omission of the duty, does not ex-

pressly authorize suits for special damages resulting to individuals from its non-performance.

At common law, the several parishes in England were bound to repair all highways within their respective limits, unless, by prescription or otherwise they could cast the burden upon particular persons or other corporations, and were subject to indictment if they failed to perform the duty; but were not liable to the suits of individuals for special damages occasioned by the want of repair. This latter proposition is to be found in Bro. Abr., tit. Sur le Case, pl. 93, and is now the settled law in England: See *Russell v. Men of Devon*, 2 Term Rep. 667; *Markinnon v. Penson*, 25 Eng. L. & Eq. 457. It has also been very generally affirmed in this country. In *Mower v. Leicester*, 9 Mass. 247 [6 Am. Dec. 63], which was an action against the town of Leicester for damages to the horse of the plaintiff, caused by the bad repair of a bridge which it was the duty of the town, under the statute, to keep in repair, it is said to be well settled that no such action would lie at common law, and that none could be maintained under the statute, as no such private action was thereby given. The court remark that "corporations, created for their own benefit, stand upon the same ground as individuals," and are liable for neglect of duty at the suit of the party injured thereby; but that "quasi corporations created by the legislature for purposes of public policy are subject by the common law to an indictment for the neglect of duties enjoined on them, but are not liable to an action for such neglect, unless the action be given by some statute." The like distinction is also taken by Chief Justice Parsons, in *Riddle v. Proprietors*, 7 Mass. 186 [5 Am. Dec. 35], who there says: "We distinguish between proper aggregate corporations and the inhabitants of any district who are, by statute, invested with particular powers without their consent. These are in the books sometimes called quasi corporations. Of this description are counties and hundreds in England, and counties, towns, etc., in this state. Although quasi corporations are liable to information or indictment for a neglect of a public duty imposed on them by law, yet it is settled in the case of *Russell v. Men of Devon*, 2 Term Rep. 667, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute." So in *Bartlett v. Crosier*, 17 Johns. 439 [8 Am. Dec. 428], it was held that a suit against an overseer of highways could not be maintained by an individual to recover damages to his mare occa-

sioned by the overseer's neglect to repair a bridge, where such right of action is not expressly given by the statute. The chancellor, in delivering the unanimous opinion of the court, says, that the law renders public officers liable to special damages for a neglect of duty only in those cases "in which their services are not gratuitous or coerced, but voluntary and attended with compensation, and where the duty is entire, absolute, and perfect.

The services of a supervisor under our statute cannot be said to be entirely voluntary. He is subject to a fine, if he refuses to serve when elected to the office. His duty is not entire, it being shared with others. The township trustees are required by the same statute to apply the road tax to the building of bridges and the repair of roads, and to contract for the erection of bridges, and to accept them when completed. Nor is his duty "absolute and perfect." It is, beyond question, dependent upon having within his control unappropriated funds and labor, belonging to the township, and sufficient to make the required repairs. The present ability of the supervisor is not stated in the petition; and it is said in the last case that such omission is not aided by verdict. He is only bound under special circumstances occurring while he is in office; and it is those special circumstances that create the duty, and not the office by itself. Both must concur to create the duty, and the absence of the one is just as fatal to the right of action as the absence of the other.

Lynn v. Adams, 2 Cart. 143, is a case very similar to the one under consideration. It was a suit against a supervisor for willful neglect, causing the death of plaintiff's horse; and it was held in that case "that a private action will not lie against a supervisor, for damages sustained from his neglect to keep the roads and bridges in his district in repair." Smith, J., examines the authorities at some length, and arrives at the conclusion that the supervisor could not be subjected in the action; and under a statute similar in that respect to ours, he also holds that the services of the supervisor are not voluntary, within the rule. He also places the liability of the supervisor upon the same grounds as that of the township; as was also done by the chancellor in *Bartlett v. Crosier*, 17 Johns. 439 [8 Am. Dec. 428]; see also *Morey v. Newfane*, 8 Barb. 646.

In several of the states, provision has been made for the recovery of damages by private suit against towns for not repairing roads, bridges, etc.; but in all of them it has been held,

in strict affirmance of the common-law rule we have adverted to, that the liability is created solely by statute, and cannot, therefore, be extended beyond the precise statutory measure: See cases cited from Vermont, New Hampshire, Maine, Massachusetts, and Connecticut, in Angell on Highways, 268.

These authorities seem decisive of the question raised by the demurrer, and show conclusively that the action in the court below cannot be maintained.

If there were any doubt as to the asserted liability of the supervisor in this case, a reference to sections 13 and 18 of the same statute would dissipate the doubt, and exclude all presumption of a legislative intent to attach any such liability to the duty imposed upon a supervisor. By those sections, persons injured by obstructions placed upon a road or highway may sue the wrong-doer for the injuries inflicted; and the omission to reserve a similar right, in favor of persons injured by the neglect or misconduct of a supervisor, certainly affords a strong presumption that no such remedy was intended. The office is one of no emolument, but of much perplexity,—its duties onerous, its powers extremely limited, and its compensation trivial. No one now covets but all seek to evade it. If to its other embarrassments liability to private suits should be superadded, no responsible citizen would accept it, though the penalty for refusal were increased many fold.

The supervisor was not, as an individual, under any obligation to repair the bridge, and the statute imposing the public duty does not confer a private right, nor impose a private duty as to third persons, as is done where a deed is delivered to a recorder for entry, or a writ to a sheriff for service and return. In the latter instances, and others of a similar character, the statute imposes a personal duty for the benefit of the person invoking its aid; and the officer would doubtless be liable for the special injury resulting from an omission to perform the duty enjoined. Of this latter class, also, are the cases of a refusal by the judges of an election to receive a lawful vote tendered them: *Jeffries v. Ankeny*, 11 Ohio, 372, 376; and a willful refusal by a supervisor to give a certificate for work done on the highway: *Brick v. Green*, Wright, 86;—both are breaches of a personal duty imposed by the statutes.

Laws imposing upon supervisors the duty of repairing roads and highways, and subjecting them to penalties for misconduct in office, have been in force in this state ever since 1804; and yet counsel, with all their industry, have not found a single

well-considered case, in which an action for special damages for a supervisor's neglect to repair has been maintained; although hundreds of instances must have occurred within that period in which such injuries have been inflicted; and that fact alone is strong if not conclusive evidence that in public estimation no such action is maintainable.

We will conclude this opinion by adopting the language of the chancellor, in the case cited from 17 Johnson, and by substituting "supervisors" for "overseers" (who discharge a similar duty in the state of New York); his remarks are peculiarly applicable to our condition. The learned chancellor says: "We have every reason to presume that our legislature did not intend to charge the officers, intrusted with the superintendence and repair of the public roads and bridges, with any greater responsibility by private suit than the penalty given against overseers for neglect of duty. If that had been their intention, and if they had meant to introduce a new rule on the subject, I think the law would and ought to have been more explicit. To sustain an action at this day against all former practice, is taking these officers by surprise. We have had our overseers from the first settlement of the colony; and the weight and responsibility of the trust must have been understood and settled in public opinion, according to the English law."

Judgment of the common pleas affirmed.

GHOLSON, BRINKERHOFF, SCOTT, and RANNEY, JJ., concurred.

LIABILITY OF MUNICIPAL CORPORATIONS FOR DEFECTIVE HIGHWAYS: See *City of St. Paul v. Selts*, 74 Am. Dec. 753; *Storrs v. City of Utica*, 72 Id. 437; *City Council v. Gilmer*, 70 Id. 562; *Hubbard v. City of Concord*, 69 Id. 520; and see the notes to the following cases: *Jones v. Inhabitants of Walham*, 50 Id. 784; *Wilson v. Mayor of New York*, 43 Id. 724; *City of Tallahassee v. Fortune*, 52 Id. 364; *Raymond v. City of Lowell*, 53 Id. 67; *Rochester W. L. Co. v. Rochester*, Id. 320; *City of Buffalo v. Holloway*, 57 Id. 553; *Huston v. Mayor etc. of New York*, 59 Id. 523.

WALKER v. WALKER.

[14 OHIO STATE, 157.]

JOINT WILL. — An instrument by which a husband and wife jointly attempt to make a testamentary disposition of the property of both, to treat it as a joint fund, jointly devising the real property of the wife, and jointly giving legacies out of the personalty of both, cannot be admitted to probate as the will of either, or of both. Such an instrument is in its nature irrevocable, and contravenes the policy of the law.

JOINT WILL IS UNKNOWN TO TESTAMENTARY LAW OF THIS COUNTRY.

IN INSTRUMENT MADE BY HUSBAND AND WIFE AS JOINT WILL, IN WHICH some of the bequests are several, and some joint, the former cannot be executed and the latter rejected, as the several provisions may have been influenced by the joint, and the intention of the testator would be thus defeated.

IN PROCEEDING IMPEACHING VALIDITY OF WILL, IT IS IMPROPER TO RENDER FINAL judgment on a demurrer to the answer. Whether the writing in question is the last will and testament of the party, is a question which must be tried by a jury.

THE opinion states the case.

Sadler and Vedder, for the plaintiffs in error.

Stone and Minor, for the defendants in error.

By Court, BRINKERHOFF, J. We are told by counsel, in the argument of this case, that the pleadings in the court below were finally framed with a view to present the sole question, whether the paper writing, which is the subject of controversy here, is or can be, by the laws of Ohio, regarded as in any way a valid testamentary instrument,—either as the joint will of David and Hanna Walker, or as the several will of each or either of them. This, too, is the question which counsel have argued. We have not felt ourselves at liberty to evade the question; for if on a point of practice we were now to do so, the question would doubtless presently reappear, and be followed by the evil of a more protracted litigation.

In considering the question, it is of primary importance to have a definite idea of what the question is; and to this end, to notice what it is not.

It is not a question relating to a will, joint in form merely, as being drawn upon the same sheet of paper, executed simultaneously, and employing terms at the beginning and close of the instrument which, considered by themselves, would imply that it was the joint act of the parties, while in the body of the will its provisions are such as to be really and necessarily several in their substance, operation, and effect. As where A

and B, joining in the execution of one testamentary instrument, therein declare their will to be that, on the death of either of them, the survivor shall have the property of the one who dies first. Such wills have been called mutual wills, by way of contradistinction from joint wills; and in Connecticut and Georgia, they have been upheld; because, it is said, they are, though joint in form, necessarily several in their operation and effect; inasmuch as under such an instrument there can be but one giver and one taker,—the whole taking effect on the death of that one who first dies, operating only on the estate of that one, — and there being, therefore, in substance and effect, but one testamentary instrument: *Lewis v. Scofield*, 28 Conn. 452 [68 Am. Dec. 404]; *Evans v. Smith*, 28 Ga. 98 [73 Am. Dec. 751]. Nor is this the case of a will where A and B join in the execution of what is, in form, a joint will, but which only disposes of property of which A is the sole owner, as shown by evidence *aliunde* the will. Such an instrument has been sustained as the several will of A; B, having nothing on which the will could operate, being held to be a mere cipher in the transaction: *Rogers et al., Appellants*, 11 Me. 303.

Nor is this the case of a will of which we have found no example in the books, but which may be readily imagined, where, though the instrument be in form and mode and time of execution joint, yet, in the body of the instrument, the testators each severally devise or bequeath to the objects of their bounty, respectively, portions of the estate of each.

Upon questions presented by such wills as these, we do not assume to pass. We leave them to be determined when they arise.

Nor is this the case of a bill in equity, based upon a compact or contract of parties embodied in the form of a testamentary instrument, and seeking a decree for a specific performance of the agreement. A case of that kind might present difficulties with which we have now neither occasion nor disposition to grapple.

But we regard the case as simply a proceeding under the statute to contest the validity of a will; in which, on the face of the will, taken in connection with the admitted circumstances and relations of the alleged testators, the question is presented whether the instrument, which has been admitted to probate, can, as a will, have any legal validity. And the case is one in which two parties, husband and wife, attempt to make a will, which is not joint in form merely, and capable

only of a several operation and effect; but one which is joint in substance; where the parties to it are severally owners of property in their individual right; where they attempt jointly to dispose of the property of each, and to treat it as a joint fund, jointly devising the real property of the wife, and jointly bequeathing legacies out of the personalty of both, without designating the proportion in which the personalty of each or either shall contribute for their payment; and from which it is evident that the provisions of the instrument must have been a matter of negotiation between the parties, and in which the disposition which each of the parties would be willing to make of his or her property would, of course, be influenced and modified by the dispositions which would affect the property of the other. In short, if there can be such a thing as a joint will, this is a joint will.

If we look at this question solely in the light which decided cases and the opinions of elementary writers throw upon it, we are left in doubt and uncertainty.

In 1 Williams on Executors, 10, it is said: "Another difference between a will and a deed may be mentioned, that there cannot be a joint or mutual will; an instrument of such a nature is unknown to the testamentary law of this country." Again, on page 104, he says: "It has already been stated that a mutual and conjoint will is unknown to the testamentary law of this country. One ground of objection to such an instrument as testamentary, is its irrevocability. However, such a will may, it should seem, in some cases, be enforced in equity as a compact." And he then proceeds to notice two cases to which we will refer hereafter.

So in 1 Jarman on Wills, 26, it is said: "A joint or mutual will is said to be unknown to the testamentary law of England. One objection to such an instrument as testamentary, is its irrevocability; for it is the essence of a will that it is ambulatory, and may be revoked at any time prior to the death of the testator. Thus in *Clayton v. Liverman*, 3 Dev. & B. 558, it was held that a paper writing executed by two persons, making, after the death of both, a joint disposition of all their property, cannot be admitted to probate as a conjoint or mutual will. And such a paper writing cannot be proved as the separate will of either of the supposed testators, because it purports to be a joint and not a separate will, and because it implies from its structure an agreement between them, which is inconsistent with its revocability, and therefore prevents its

operation as a will. However, such a will may, it should seem, in some cases, be enforced in equity as a compact."

In the case of the *Earl of Darlington v. Pulteney*, 1 Cowp. 260, Lord Mansfield, considering the question whether a common-law power to appoint by deed was well executed by a will or not, says: "The first requisite which the power prescribes is impossible to be performed by will; which is, that it shall be by joint deed of Lord Bath and his son. Now, there cannot be a joint will."

The cases of *Dufour v. Pereira*, 1 Dick. 419, and *Walpole v. Oxford*, 3 Ves. Jr. 402, have really nothing to do with this case regarding it, as we do, simply as a proceeding under the statute, for contesting the validity of a will. In those cases, the first seems to have been the case of a joint will, and the latter of separate wills mutually made in pursuance of an agreement between the respective testators. In both cases, a revocation, or modification, was made by one of the parties to the joint will, or mutual wills. In neither case was the question of the validity of any of these instruments, as wills, before the court. On that point, no decision was made,—no opinion expressed. In both cases, they were proceedings in equity to enforce the performance of contracts, compacts, or agreements, alleged to be embodied in instruments testamentary in form. In the first case, Lord Camden sustained the alleged compact, and held the attempted revocation to be of no effect; in the second case, Lord Loughborough sustained the revocation; not however, it would seem, on the ground either of the validity or the invalidity of such instruments, whether considered as wills or as compacts, but on the ground of the uncertainty and unfairness of the alleged compact. These cases, I repeat, have nothing to do with the question before us. When a petition, in the nature of a bill in equity, is filed to enforce any contract which may be supposed to be embodied in the instrument under consideration, then, and not until then, may these cases have a bearing on the question to be considered.

We have said that these cases have no application to the question before us; and we may say the same in respect to the cases of *Rogers et al.*, in Maine; *Lewis v. Scofield*, in Connecticut, and *Evans v. Smith*, in Georgia, before referred to; for in all of those cases the wills respectively were sustained on the ground that though they were joint in form they yet were, and from their structure and the nature of their provisions, viewed in the light of surrounding circumstances, could

be only separate wills in their substance, operation, and effect. And in all those cases the courts which decided them are careful to distinguish between such wills and those which are joint alike in form and in substance. And in none of them is there the least intimation that a paper like the one now under consideration would be upheld as a testamentary instrument.

Thus far, it will be seen, we have no decided case upon the question before us; but we have the opinion of Lord Mansfield, expressed *arguendo*, and the opinions of learned elementary writers, in Williams and Jarman, to the effect that such a thing as a joint will cannot be, and is unknown to the testamentary laws of England.

We will now notice the adjudged cases, so far as we are aware of the existence of such.

The first case in England, of which we are aware, is that of *Hobson v. Blackburn*, 1 Add. Ecc. 274. The instrument passed upon, in that case, resembles those in the cases from Georgia and Connecticut, before referred to. A brother and two sisters joined in the execution of an instrument of testamentary form, providing (subject to a condition not necessary to be here noticed), in substance, that in case of the death of either, the property of the deceased should go to the survivors; and on the death of a second party to the instrument, the whole should go to the last survivor. But the case differs from the Georgia and Connecticut cases in this, that after the death of one of the parties to the instrument, one of the survivors made another will, which, in effect, superseded and revoked the former joint will; and on her death, both the joint will and the subsequent separate will were "pounded," or offered for probate as the last will and testament of the maker of both. Probate of the joint will was rejected. And Sir John Nicholl, deciding the case, says: "I have no hesitation whatever in rejecting the allegation propounding the mutual or conjoint will, as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country; or in other words, that it is unknown, as a will, to the law of this country at all. It may, for aught that I know, be valid as a compact; it may be operative, in equity, to the extent of making the devisees of the will trustees for performing the deceased's part of the compact. But these are considerations wholly foreign to this court, which looks to the instrument entitled to probate as the deceased's will, and to that

only. The allegation plainly proceeds upon the notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why, this very circumstance destroys its essence as a will, and converts it into a contract,—a species of instrument over which this court has no jurisdiction. Upon these broad, and as I apprehend sufficiently intelligible, grounds, I reject this allegation.”

The next English case is that of *Stracey and Wife*, decided on motion by the prerogative court of Canterbury, and reported in 1 Dea. & S. 6. It seems to be a case entirely in point, and was decided directly the other way. “Lady Stracey,” it is said, “had a power of appointment by will over certain property; and Sir J. H. Stracey had, as survivor, a power of appointment over other property, independent of his general property.” The statement in respect to the form and contents of the will is as follows: “The will commenced: ‘We, Josias Henry Stracey and Diana Stracey, do hereby declare this to be our last will; and after the payment of all our just debts and funeral expenses, we direct that all our moneys,’ etc. Certain bequests were then given to their children; and there was an appointment of executors of ‘this our joint will.’” It was attested also as the will of both. And both being dead, and no revocation having been made by either, “Deane moved the court to decree probate of the paper, as the last will and testament of Diana Stracey, to be granted to the executors, limited to all such personal estate and effect as she, the said D. S., had a right to appoint or dispose of; also to decree a special general probate of the said paper, as the last will and testament of Sir J. H. S. to the executors.” The following is the opinion entire as reported:—

“Sir John Dodson: I think you are entitled to the prayer of your motion. *Hobson v. Blackburn*, 1 Add. Ecc. 274, when examined, is certainly not an authority against you. The paper should have been proved as the will of Lady Stracey upon her decease, but that cannot affect the right of the executors now.”

The last English case is that of *In the Goods of Raine*, decided by the court of probate in 1858, 1 Swab. & T. 144. It was the joint will of two brothers, who were in partnership as farmers, and were joint tenants of certain real estate, giving and making several specific legacies and bequests to various persons, and jointly devising the real estate to another. By the express terms of the will, no part of it was to have effect

until after the death of both testators. On the death of one of the brothers, the paper was offered for probate, and the court held that such an instrument could not be admitted to probate until after the death of both the parties. Sir C. Creswell, in rejecting the application, named no objection to the probate other than the fact that one of the parties to the instrument was yet living; thus leaving us to infer that if both had been dead he would have admitted it to probate.

Coming now to this country, we find but two cases which seem to have a bearing on the subject. The first is *Clayton v. Liverman*, decided by the supreme court of North Carolina in 1837, 2 Dev. & B. 558. It is very closely in point with that before us, and in the opinion of the court, as reported, the law of the case is very thoroughly discussed, both on principle and authority. There the parties, two unmarried sisters, gave, after their decease, a negro man to one nephew, and another negro man and all the rest of their property, after their decease, to another nephew. In form and mode of execution, the instrument was throughout a joint one. The following is a very accurate *syllabus* of the case: "A paper writing executed by two persons, making, after both their deaths, a joint disposition of all their property, cannot be admitted to probate as a mutual or conjoint will. And it was held, Daniel, J., dissenting, that such a paper writing could not be proved as the separate will of either of the supposed testators, because it purported to be a joint, and not a separate will; and because it implied, from its structure, an agreement between them, which was inconsistent with its revocability, and therefore prevented its operation as a will."

The second case is that of *Ex parte Day*, decided by the surrogate of the county of New York, 1 Bradf. 476. The statement of that case, as reported, is very brief, and is as follows: "The will propounded for probate is an olograph, bearing date August 20, 1850. The last clause of it purports to be a testamentary disposition by the decedent's wife, of some property belonging to her in her own right; in the language of the will, 'testified by her signature hereto.' The will was executed under seal, both by the decedent and by his wife, in the presence of three witnesses." The learned surrogate, in deciding to admit the paper to probate as the will of the decedent, goes into a somewhat elaborate discussion of the subject of joint wills, and argues in favor of their validity; but from his brief statement as to the character and contents of the will

before him for probate, it would seem that the instrument, though executed jointly by husband and wife, was, in its terms, as employed in the body of the will, and in its operation and effect, the separate will of each; for all that is said as to the provisions of the will is, that "the last clause of it purports to be a testamentary disposition by the decedent's wife of some property belonging to her." This is very different from the will in this case, and does not raise the question we are called on to decide.

By this contrariety of decision and opinion abroad, there being no Ohio case on the subject, it seems to me we are thrown back upon the consideration of the question on principle, with such aids as we may gather from the policy of our legislation.

As has been said by Williams and Jarman, the principal objection to a joint will is the quality of revocability which is inherent in a will. It is of the essence of a will that it is revocable. An irrevocable will is an anomaly,—a contradiction in terms. It is the first deed and the last will, which is operative. It is the policy of our law that wills may be readily revoked; and hence, our statute of wills provides "that a will shall be revoked by the testator's tearing, canceling, obliterating, or destroying the same (with the intention of revoking it), by the testator himself, or by some person in his presence, or by his direction"; or by some other writing executed with the same formalities as a will as well as by operation of law. Wills ought to be readily revocable, and always subject to modification. And among the leading reasons on which the law proceeds in allowing testamentary dispositions of property in facilitating their revocation and modification, and in the indulgence and tenderness with which testators are regarded when their testamentary capacity is questioned, are these: 1. That the circumstances of a testator, and the character, fortunes, and wants of the natural objects of his bounty, are subject to constant change. To-day a testator makes his will; to-morrow a daughter is widowed, or a son is crippled; and so, what would be reasonable in a will to-day becomes unreasonable by the accident of to-morrow; 2. That this absolute power of testamentary disposition of property, of revocation and modification, is a protection to the natural feebleness and dependence of age; enabling it, by its power to disappoint or to fulfill the expectations of others, to command that respectful attention which might otherwise be refused by the natural indifference

of strangers, or unnatural indifference of relatives. And just so far as a joint will clogs the power of convenient revocation, it contravenes the policy of the law. We are not now required to decide the question whether equity will enforce the compacts which may be embraced in an attempted joint will, and thus in effect to enable parties to make, not only a joint will, but one which is irrevocable; and we therefore pass it without further observation. But aside from this question, it seems to us evident that the sanctioning of such a will must operate to clog the power of convenient revocation. In the case of an individual testator and a separate will, the instrument is naturally either in his own manual custody or complete control; and revocation by "tearing, canceling, obliterating, or destroying," is easy; but in the case of a joint will, either one alone of the parties to it, or a third person, would become its custodian; and if one of the parties is illiterate or bed-ridden, or is otherwise incapable of or indisposed to the execution of a written revocation, the last will of that party may be defeated. And these considerations apply with increased force where the attempted joint will is that of husband and wife, and where the husband naturally becomes the custodian of the instrument.

Again, such wills as this necessarily include something in the nature of a compact. Each provision must be made in view of, or in consideration of, and be influenced by, every other provision of the will. And this fact interposes a moral barrier, at least, to the exercise of the power of revocation, however changed may be the circumstances of the testator or the deserts or needs of the objects of his bounty. And if we say the will may be revoked while both parties are living, but not after the death of one, then we make that anomalous thing an irrevocable will; or if we say that either may revoke as to him or herself after the death of the other, then we must either hold the will to be, in effect, revoked as to both, or open the door to cruel frauds upon the deceased testator.

And it seems to me that there is great if not conclusive weight in the argument on which the North Carolina case to a great extent proceeds, to wit, that such an instrument is necessarily in the nature of a compact; that a compact is, in its nature, irrevocable; and that such an instrument, therefore, cannot be a will, for it is of the essence of a will that it is revocable.

When this case was first presented for our consideration, the idea of a joint will struck us as being an utter novelty. And

it seems to us that the idea must have been equally a stranger to the legislature which enacted our statute of wills, and statutes for the settlement of the estates of deceased persons. In all their provisions and phraseology, they provide for nothing, and seem to contemplate nothing but separate wills and individual estates. "Any person of full age," etc., may make a will, etc.; shall be signed "by the party making the same," etc.; shall be "attested and subscribed in the presence of such party," etc.; may be deposited in the office of the probate judge "by the party making the same," etc., "in the county in which such testator lives," etc.; shall be indorsed with the "name of the testator," etc.; and in the lifetime of the testator shall be "delivered only to himself"; and so on throughout. It is said, however, in reply to this suggestion, that in the reasonable construction and application of these acts, provisions which apply to persons and things expressed in the singular number only will be held to apply as well to persons and things in the plural number, when the policy and evident intent of the act requires it. But on this subject, the statute of wills is its own interpreter. Section 77 of that act provides that "every word in this act importing the masculine gender may extend and be applied to females as well as males; and every word importing the singular number only may extend and be applied to the several persons or things as well as to one person or thing"; but nothing is said as to words importing the singular number, only extending to persons acting jointly, or to the joint acts of persons.

Again, our legislature provides, in extended detail, for the speedy settlement of the estates of deceased persons. Suppose now that a joint will like this, dealing with the separate property of both parties as if it were a joint fund, is held to be a valid will. One of the testators may survive the other for half a century. When is the will to be proved, and to thus become practically operative? On the death of both testators? If so, how is the estate of the first decedent to be administered in the mean time, and what is to become of debts and legacies? If it is to be proved on the death of the first decedent, how are the legacies to be paid? If they remain in abeyance until after the death of both testators, what, in the mean time, is to be done with that portion of the property of the decedent which is ultimately to be devoted to their payment? If on the other hand, they are to be paid in part at once, in what proportion is the property of the first decedent to contribute for that pur-

pose? It seems to us that the recognition of the valid existence of such a will would be so fruitful of practical difficulties as to render it wiser and better to ignore their cause, than to attempt to meet and overcome them. And if we were to make this attempt, it would be "a leap in the dark," without the guidance of any statute, or the light of any precedent.

But it is said, and it is true, that the second and third items of this will are really, in form and substance, separate dispositions of his or her property, by each of the testators in favor of the survivor, for life; and it is argued, on the authority of the cases before noticed, in Connecticut and Georgia, that these items of the will at least are valid, and ought, therefore, to be admitted to probate. But we do not think so. If these items were the only provisions in the will, or if all its provisions were of a like character in this respect, then the case would come within the principle of the cases referred to, and this will would stand or fall as this court might adopt or reject the authority of those cases. As to the correctness, or otherwise, of the doctrine of those cases, we express no opinion; nor is it necessary to do so; for this case widely differs from them. Here the most important devises and bequests of the will are joint in form, and joint in substance and effect, and as before remarked, each devise and bequest of the will must have been made, in some sense, in consideration of each and all the rest; and if one item was permitted to stand and others to fall, it might operate as a grievous wrong upon the intentions of one or both of the testators.

A majority of the court are of opinion that the court below did not err in holding that this instrument is not the valid joint will of both the parties to it; nor in holding that it is not the valid separate will of each or of either of them. But we think that court did err in a matter of practice prescribed by the statute; for which reason alone its judgment will have to be reversed, and the cause remanded for another trial by jury, under proper instructions by the court. The court below decided the case, and gave judgment upon demurrer to the answer; while the statute imperatively requires that "an issue shall be made up, whether the writing produced be the last will of the testators or not, which shall be tried by a jury," etc. This provision of the statute is imperative in its terms, and we have reason to believe that it was deliberately enacted with a view to prevent a disposition of cases for the contest of

wills upon the mere consent or acquiescence of parties in any form.

Judgment reversed, and cause remanded.

PECK, C. J., and RANNEY, J., concurred.

GHOLSON and SCOTT, JJ., dissented as to the first and second propositions of the *syllabus*.

AN EXTENSIVE NOTE IS WRITTEN upon the subject of joint wills to the case of *Lewis v. Scofield*, 68 Am. Dec. 407. In this case, the cases upon this question are collected; and our principal case is cited, commented upon, and its doctrine somewhat limited.

THE DOCTRINE OF *Walker v. Walker* has been since limited by the supreme court of Ohio, in *Betts v. Harper*, 39 Ohio St. 639. In this case, it was decided that tenants in common of real estate, who are also owners, severally, of personal property, may dispose of the same by will, by uniting in a single instrument, where the bequests are severable, and the instrument is not in the nature of a compact, but is, in effect, the will of each, revocable by him, and subject to probate as such several will; and where the instrument is not offered for probate until the death of all executing it, the same may then be admitted to probate as the will of each and all such persons. The principal case is cited in *Holt v. Lamb*, 17 Id. 374, to the point that it is error to proceed by mere decree, and without the intervention of a jury, to set aside a will which is contested.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PHILLIPS *v.* ALLEN.

[41 PENNSYLVANIA STATE, 481.]

COMMON COUNCIL MAY IMPOSE FINES AND OTHER PROHIBITORY PENALTIES, which are certain, but it has no power to enact that, where fruit is found in market in baskets not marked in a certain way, both fruit and baskets shall be forfeited.

REPLEVIN by J. C. Allen against George Phillips, to recover eight baskets of apples. By ordinance it was provided that every basket, box, etc., in which fruit was exposed for sale in market should have the fractional part of a bushel it contained marked thereon. Allen brought fruit in unmarked baskets, and exposed it for sale. It was thereupon seized by the clerk. Allen then brought this action to recover the apples. Judgment for plaintiff, and defendant prosecuted his writ of error.

D. W. Sellers and Charles E. Lox, for the plaintiff in error.

Lewis C. Cassidy, for the defendant in error.

By Court, READ, J. There was no enactment by the legislature expressly authorizing the forfeiture of the baskets, or other articles not stamped or marked according to the provisions of an ordinance of the city of Philadelphia of the 1st of October, 1858; and this being the case, the select and common councils have no power to inflict any such punishment in this form. They may impose fines or penalties, or pecuniary forfeitures which are simply penalties, and their recovery is au-

thorized by the acts of the 15th of April, 1835, 29th of June, 1839, and 11th of March, 1846.

A corporation created by act of Parliament cannot make such a law unless the power be especially given by the act: 2 Kyd on Corporations, 110; and in general the rule is, that a by-law, without an express act of Parliament, can only be enforced by a pecuniary penalty, which must be certain: Grant on Corporations, 84. We think this power should be given to the city of Philadelphia.

Judgment affirmed.

POWER OF MUNICIPAL CORPORATIONS TO PASS ORDINANCES IMPOSING FINES, PENALTIES, AND FORFEITURES: See extended note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 640, where the principal case is cited to the point that municipal ordinances cannot declare a forfeiture of property unless that power is granted in express terms.

THE PRINCIPAL CASE WAS CITED in *Kneidler v. Borough of Norristown*, 109 Pa. St. 371, to the point that where a city ordinance requires that baskets used for the sale of fruit and vegetables shall have the fractional parts of a bushel contained in each marked or stamped thereon, or else to be forfeited with contents, the city councils have no power to inflict that penalty for the violation of the ordinance, in the absence of an act of the legislature expressly authorizing the forfeiture. The same doctrine, said the court, has been held in many similar cases. After citing a number of cases to this point, the court further said that it is true, as a general rule, that "the power to impose pecuniary penalties resides in municipal corporations, and may be exercised without special legislative authority for that purpose. And it may also be true that an ordinance imposing a pecuniary penalty and also a forfeiture may be good as to the penalty and void as to the forfeiture." The principal case was cited in *President and Trustees etc. v. Moore*, 34 Wis. 450.

WEBSTER'S EXECUTORS v. NEWBOLD.

[41 PENNSYLVANIA STATE, 432.]

TRUST WHICH PREVENTS RUNNING OF STATUTE OF LIMITATIONS DOES NOT ARISE, WHERE, WITHOUT FRAUD OR CONCEALMENT, OR AGREEMENT TO HOLD IN TRUST, TWO OF THREE ATTORNEYS ENGAGED IN A CAUSE RECEIVE THE FEES FOR ALL.
ACKNOWLEDGMENTS OF INDEBTEDNESS AND PROMISES TO PAY, TO TAKE CLAIM OUT OF STATUTE OF LIMITATIONS, MUST BE EXPLICIT IN THEIR TERMS AND UNAMBIGUOUS, BOTH AS TO THE ENGAGEMENT OR ACKNOWLEDGMENT, AND ALSO AS TO THE SUM OF MONEY INTENDED TO BE PAID OR ACKNOWLEDGED.
EXCEPTION TO BAR OF STATUTE OF LIMITATIONS MUST BE TAKEN ADVANTAGE OF BY SPECIAL PLEA AND SPECIAL REPLICATION.

CASE. Daniel Webster had been employed as counsel with Messrs. Newbold, Tilghman, and others, in the settlement of the Aspden estate, and was to have a contingent fee of two

and one half per cent on the amount recovered. After the labor in the case was done, but before the fees were collected, Mr. Webster died. Newbold, Tilghman, and others received the full amount of fees stipulated for all, but failed to turn over any part of them to the Webster estate. The fees were received in 1853, but suit was not commenced for them by the executors of Webster's estate until 1860. In January, 1860, Mr. Newbold acknowledged that Mr. Webster was entitled to compensation, and that he was willing to pay something, but that Tilghman's executrix, Mr. Tilghman's death having occurred after Mr. Webster's, would not consent, and the sum of two thousand dollars was mentioned as the amount that should be paid. Under the instructions of the court, the jury found a verdict for defendants, and the case was certified to the supreme court in bank. The other facts sufficiently appear in the opinion.

Harrison, for the plaintiffs.

McAllister and Northrop, for the defendant.

By Court, THOMPSON, J. On the trial at *nisi prius*, my brother Woodward presiding, held that the plaintiffs could not recover on the special agreements set forth in the *narr*. No exception was taken to this ruling, and this left the case upon the general counts for services, and for money had and received. The pleas were *non assumptis*, payment with leave, and the statute of limitations.

The errors assigned are all to the charge of the court, and the first is in saying "that the evidence seems to be that Mr. Newbold received the money on the 18th of February, 1853, more than six years before suit brought, and if the jury are satisfied of that, then their verdict should be for the defendant."

The records of the circuit court show that that was the day on which the defendant received all the fees which were received by him out of the share of his clients of the Aspden estate. It was ordered to be paid as fees by the circuit court. Any sums paid to him afterwards, by order of the court, were for the benefit and use of his clients. This receipt of fees was of the date mentioned in the charge, and was truly said to be more than six years before suit. The statute, being pleaded, was therefore a bar to a recovery, unless rebutted. This was attempted by alleging a trust in the defendant for a share to Mr. Webster; secondly, an acknowledgment of a debt suffi-

cient to prevent the operation of the statute; and thirdly, by raising the point here that administration was not granted in this commonwealth until within six years before suit brought.

As to the first of these answers to the statute, we may say we see no evidence of an express trust in the case. If Messrs. Newbold, Tilghman, and Webster were to share the fees to be received in equal proportions, and the two former received the whole sum, this, without more, would be only one step towards establishing an express trust, and good for nothing without an agreement or declaration to hold it in trust. There was nothing of that. There was no allegation that it was an implied trust arising *ex maleficio*. If Mr. Newbold did receive a share which, in equity and good conscience, should have belonged to Mr. Webster, this was not such a trust as would prevent the statute from running. The rule is settled that the statute is inapplicable only to express trusts, or those which are mere creations of courts of equity, with some exceptions of implied trusts in favor of infants, and perhaps other cases of legal incapacity; but "trusts," as was said by Washington, J., *Wisner v. Barnet*, 4 Wash. C. C. 631, "which are the ground of an action at law, are within it": See also *Lyon v. Marclay*, 1 Watts, 275; *Finney v. Cochran*, 1 Watts & S. 112 [37 Am. Dec. 450]; *Agnew v. Fetterman*, 4 Pa. St. 56 [45 Am. Dec. 671]; *Derrickson v. Cody*, 7 Id. 31; *Downey v. Garard*, 24 Id. 52. There being, at most, but a receipt of the money claimed as belonging to Mr. Webster's estate, if there was any trust it belongs to this last class. It was not a trust *ex maleficio* by reason of fraud or concealment. The receipt for the fees was perpetuated by the records of the circuit court. Besides, too, the executors engaged Mr. Randall before he left Marshfield, whither he had been attending the funeral of Mr. Webster, to look after this matter, and in pursuance of which he did speak to Messrs. Newbold and Tilghman on the subject, and no concealment was resorted to by either of them in regard to the receipt of counsel fees.

We also entirely concur with our brother Woodward that there was not sufficient in the Randall testimony to be left to a jury, from which to find a promise by the defendant to pay any sum of money on account of the professional services of Mr. Webster. He expressed a willingness to pay something, if other parties would also. They refused, and Mr. Randall says: "Mr. Newbold's proposition fell." Promises to pay and acknowledgments of indebtedness, to take a claim out of the

statute of limitations, must be explicit in their terms, and unambiguous, both as to the engagement or acknowledgment, as also to the sum of money intended to be paid or acknowledged: *Nixon v. Brownfield*, 14 Pa. St. 319; *Huff v. Richardson*, 19 Id. 388; *Laforge v. Jayne*, 9 Id. 410; *Morgan v. Walton*, 4 Id. 321; *Gilkyson v. Larue*, 6 Watts & S. 213. This view not only answers the second inquiry, under the first assignment of error, but also the second assignment. The position was taken here, for the first time in the case, that the statute of limitations was no bar to the plaintiffs' recovery, because administration had not been granted when the cause of action accrued. It is certain that administration must have been granted in Massachusetts about, if not before, that time, for in the fore part of March, 1853, it is in proof that a claim was proposed, in the name of the executors, before an auditor having charge of reporting distribution on the Aspden estate. What effect that might have on the question of no administration here, it is not necessary to decide, for that fact was not replied to the plea of the statute of limitations; and in *Shaeffer's Estate*, 9 Serg. & R. 263, Duncan, J., expressly says that it should be replied. So in *Geoghegan v. Reed*, 2 Whart. 152, non-resident and beyond seas was replied to the plea of the statute. In *Brown v. Agnew*, 6 Watts & S. 235, it was said by Sergeant, J.: "The burden lies on him who seeks to avoid the plea of the statute of limitations to an action of account, render, or *assumpsit*, by the replication that it was an account between merchant and merchant, and the replication to such plea must go further, and state that no account of said merchants was ever adjusted or settled: *Godfrey v. Saunders*, 3 Wils. 79, 80; S. C., 3 Saund. 127, note." So in *Bevan v. Cullen*, 7 Pa. St. 281, it was holden, Rogers, J., delivering the opinion of the court, "that in order to prevent the operation of the act of limitations," where the party has been beyond seas, "the exception to the bar of the statute must be specially replied"; and he cites *Clark v. Hougham*, 2 Barn. & C. 149; *South Sea Company v. Wymondsell*, 3 P. Wms. 144; and *Brown v. Agnew*, 6 Watts & S. 238. No special replication of non-administration is to be found in this record; consequently, the question sought to be raised here is not raised in the pleadings, and is not properly before us. The authorities cited simply embody the familiar principle that he who would bring himself within an exception of the law must plead the exception, and thus make way for proof of the fact by himself, and an answer to it by his opponent. We think, there-

fore, that none of the reasons, suggested in argument, proves error in the charge of the court on the question of the statute of limitations.

The two remaining assignments are generally errors which we cannot notice. They point to nothing specific.

Judgment affirmed.

READ, J., did not sit in the argument of this case.

APPLICATION OF STATUTE OF LIMITATIONS TO TRUST CASES: See notes to *Smilie v. Biffle*, 44 Am. Dec. 159; *Tinnen v. Mebane*, 60 Id. 212. Express or direct trusts are not affected by the statute of limitations: *Haynie v. Hall's Ex'r*, 42 Id. 427; *Commonwealth v. Moltz*, 51 Id. 499; *Tarleton v. Goldthwaite*, 58 Id. 296; *Lexington Life etc. Ins. Co. v. Page*, 66 Id. 165; but implied and constructive trusts are: *Haynie v. Hall's Ex'r*, 42 Id. 427; *Tinnen v. Mebane*, 60 Id. 205.

PROMISE OR ACKNOWLEDGMENT, TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS, necessity and essentials of: See notes to *Shoemaker v. Benedict*, 62 Am. Dec. 101; note to *Richardson v. Thomas*, 74 Id. 638; *Harlan v. Bernie*, 76 Id. 428, and collected cases in note thereto 431.

STATUTE OF LIMITATIONS, WHEN MUST BE SPECIALLY PLEADED: *Gebhart v. Adams*, 76 Am. Dec. 702, and note 704.

STEMAN, BAKER, & Co. v. HARRISON AND HOOPER.

[42 PENNSYLVANIA STATE, 49.]

PROMISE TO ACCEPT BILL FOR FIXED AMOUNT IS EQUIVALENT TO ACCEPTANCE, not only as to the drawer, but as to every party who takes the bill on the faith of that promise.

ASSUMPSIT. Joseph Elstner sent a consignment of flour to Steman, Baker, & Co., and advised the latter that he had drawn upon them for one thousand dollars. When the draft was presented, the figures "\$1,000" were in the margin; but the body of the draft contained the words "eleven hundred dollars." Steman, Baker, & Co. declined to accept the draft, but wrote Elstner to "send a correct one, and we will accept." Elstner drew a second draft on Steman, Baker, & Co., and showed their letter to Harrison and Hooper, the payees, who presented it to Steman, Baker, & Co. for acceptance. They refused to accept it, on the ground that Elstner had failed in business, and was indebted to them in a large sum. The draft was protested, and Harrison and Hooper brought this suit on the alleged acceptance contained in the letter of Steman, Baker, & Co. to Elstner. The court gave judgment for plaintiffs, and the case was removed by defendants to the supreme court.

Edward H. Weil and Henry M. Phillips, for the plaintiffs in error.

J. B. Townsend, for the defendants in error.

By Court, WOODWARD, J. The rejection of the evidence referred to in the specification of errors is of no consequence if the court were right on the main question of the cause, and we think they were right for the reasons rendered in the opinion upon the reserved point.

The case is distinguished from *Howland v. Carson*, 15 Pa. St. 454, by the very material circumstance that Harrison and Hooper took the second draft on the faith of the letter of Steman, Baker, & Co., of the 2d of February, 1860. Though not addressed to them, that letter was shown to them, as was proved by William Stewart, and they were thus expressly informed by the defendants that the first draft had been declined merely for an "informality in drawing," and that if a correct one were sent they would accept it. When a corrected draft was sent, in pursuance of this proposition, they were bound to accept it. The authorities cited show the rule of law to be that a promise to accept a bill for a fixed amount is equivalent to an acceptance, not only as to the drawer, but as to every party who takes the bill on the faith of that promise. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. And this credit is given as effectually by a letter written before the date of the bill as by one written afterwards. Hence Chief Justice Marshall stated the result of the authorities to be, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise: *Coolidge v. Payson*, 2 Wheat. 75. This case, though much discussed in subsequent cases, has never been shaken, and it states the principle that is decisive against the plaintiffs in error.

The judgment is affirmed.

PROMISE TO ACCEPT BILL, WHEN SUFFICIENT: *Carrollton Bank v. Taylor*, 35 Am. Dec. 219; acceptance may be by a separate writing: *Note to Ward v. Allen*, Id. 389. That "almost anything amounts to an acceptance," see note to *Walker v. Lide*, 44 Id. 253.

CITATION OF PRINCIPAL CASE.—In *Exchange Bank of St. Louis v. Rice*, 36 Mass. 292, the court held that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the latter, a virtual acceptance binding the person who makes the promise. And the general rule laid down by the supreme court of the United States in terms includes letters written within a reasonable time "before or after" the bill. This rule, said the court, has been applied with all its limitations, as a rule of the general law merchant, to promises of the drawee to the drawer to accept bills already drawn, by the supreme courts of New York, New Jersey, and with some qualification, Pennsylvania; and has been affirmed in New York and Missouri, and perhaps in other states, by statute. The principal case was cited as to the rule in Pennsylvania. In *Exchange Bank etc. v. Rice, supra*, many cases were also cited as to promises to accept non-existing bills, and which did not necessarily involve any question upon promises to accept bills already drawn.

FILBERT v. HOFF.

[42 PENNSYLVANIA STATE, 97.]

TENANT IN COMMON IS NOT GUILTY OF TRESPASS against his co-tenant in putting his co-tenant's tenant out of possession of buildings which he, the ejector, had built and occupied, but which had become casually vacant.

MERE DENIAL OF CO-TENANT'S TITLE IS NOT TRESPASS upon his possession, nor equivalent to an ouster.

TENANT IN COMMON CANNOT MAINTAIN TRESPASS AGAINST HIS CO-TENANT for cutting and carrying away timber, where no ouster is proved.

TRESPASS *quare clausum fregit* by William Hoff against Filbert and others for breaking plaintiff's close, and cutting and carrying away timber. The facts necessary to understand the points decided are stated in the opinion. There was judgment for plaintiff, and defendant took a writ of error.

John Bannan, for the plaintiff in error.

F. W. Hughes, C. D. Hipple, and C. L. Pinkerton, for the defendant in error.

By Court, THOMPSON, J. The second, third, and seventh assignments of error cover, in its various aspects, the material question in this case, and being determined in the manner we propose to do, will render unnecessary any notice at length of the other points in the case.

The facts in the case seem to be that the plaintiff became the owner of an undivided three fourths of the tract of land on which the alleged trespass was committed in 1847. We need

not take special notice of the fact that Root's deed to him was for the entire tract, for it clearly appeared that Root had but an undivided interest of three fourths to convey. The defendant had formerly owned the one fourth of the same tract, but sold it, and in 1853 became reinvested with a one-twelfth interest in the tract.

A careful examination of the testimony given on the trial shows that both parties had been in possession of the land, and exercised acts of ownership over it, for several years prior to the commencement of this suit. Indeed, the plaintiff claims to have had possession at all times, and charges the defendant with trespasses from the acquisition of title, or at least back to the year 1853.

The truth of the case undoubtedly was that both were in possession during the time, but the plaintiff characterizes the defendant's possession as a succession of trespasses. I have not been able to find any evidence of the exclusion of the plaintiff by the defendant from the premises, so as to bring him within the rule laid down in *McGill v. Ash*, 7 Pa. St. 397. The thing looking most like it is his putting the plaintiff's tenant out of his (defendant's) own house, which he had built and occupied two or three years by tenants and laborers, and which, becoming casually vacant, the plaintiff placed a tenant under a lease of the tract for ten years therein. But this was not a trespass against the plaintiff. If it was a trespass against anybody, it was against the tenant. The plaintiff's possession was not interfered with, nor was he expelled from the land, or even, so far as I can remember, forbidden to enter on the land, or to cease occupying it.

But it was admitted on the trial that the defendant denied the plaintiff's title. This of itself was not an ouster; it would have been evidence to show with what intent an exclusion from the land was made, if the defendant had totally expelled the plaintiff. But this he did not do, and this denial ended as it began,—in words.

The question then recurs, Is the action of trespass *quare clausum fregit*, brought by the plaintiff against the defendant for cutting and carrying away timber from the land, under these circumstances, sustainable? If I am right in the facts, it is, in effect, an action of trespass for taking profits from the land, both parties being in possession as tenants in common. Now, as they hold by distinct and several titles, but by a unity of possession, in the language of law-writers, "none knoweth

his own severalty, therefore all occupy promiscuously": 1 Bla. Com. 191. They are said to be seised *per my et per tout*, in the parts as well as in the whole. How, therefore, can one be a trespasser against another, when both are in possession according to their titles, enjoying what the law gives them a right to enjoy?

The facts here do not bring the defendant within the cases of *McGill v. Ash*, 7 Pa. St. 397, and *Trauger v. Sassaman*, 14 Id. 514, and perhaps a *dictum* or so elsewhere. In them the ground of decision was upon an entire expulsion of the plaintiff from the common property,—an "unequivocal ouster," as it was called. That, however, is not this case. It is not the cause of action set forth in the *narr.*, nor what was referred to the jury as the basis of their recovery. The learned judge charged "that if Filbert, in 1853, acquired title to the one twelfth, which he did not assert to Hoff, but afterwards entered upon Hoff's possession of the entire tract, repudiating and denying Hoff's title to any part thereof, and claimed to hold the whole tract hostile to Hoff, that such entry by Filbert is a trespass upon the possession of Hoff, for which he may maintain this action."

This was an error. It was carrying the law beyond its true boundary. It was giving the force of an actual ouster and exclusion, the foundation on which the two cases cited rest, to a mere declaration in denial of plaintiff's title. This was the utmost length to which the admission on this point went; but this was not an act. Words never constitute a trespass, much less do they forfeit a right, unless somebody is prejudiced by them. Hoff was divested of no possession thereby; that continued; nor did the declaration enlarge the defendant's right to his prejudice.

The parties both being in possession at the time suit was brought, and before, under titles that neither disputed, to the extent of three fourths in one and the one twelfth in the other, trespass would not lie by one against the other, and hence the action did not lie here; and the judge erred in charging as stated in the three assignments of error stated. If tenants in common cannot agree together, let them procure partition; and if one has taken more than his share of the profits of the land, he can be compelled, in the proper form of action, to account to his co-tenant for the overplus.

Judgment reversed, and *venire de novo* awarded.

TRESPASS BY TENANT IN COMMON AGAINST HIS CO-TENANT FOR CUTTING AND CARRYING AWAY TIMBER, ETC., when may be maintained: *Wait v. Richardson*, 78 Am. Dec. 622, and note 626; *Welch v. Clark*, 36 Id. 368, and note 372. As to when he may maintain trespass *quare clausum fregit*, see *Anders v. Meredith*, 34 Id. 376; note to *Odiorne v. Lyford*, 32 Id. 392. One tenant in common cannot maintain trespass against his co-tenant without actual ouster: *Harman v. Gartman*, 18 Id. 656; *Porter v. Hooper*, 29 Id. 490. Trespass by one co-tenant against another is discussed at length in the note to the case last cited.

PIERCE v. CLOUD.

[42 PENNSYLVANIA STATE, 102.]

ENJOYMENT OF WAY AS OF RIGHT IS DEFINED TO MEAN an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by presumption and adverse user, or by deed confirming the right; or though not strictly legal, yet lawful to the extent of excusing a trespass.

TWENTY-ONE YEARS OF USE AND ENJOYMENT OF RIGHT OF WAY, AS OF RIGHT, CONVEYS TITLE, and the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the right claimed by the other party.

MERE DECLARATION OF ONE THAT HE USES WAY BY SUFFERANCE is insufficient to divest him of rights acquired by prescription.

TRESPASS *quare clausum fregit* brought by J. N. Pierce against Jesse Cloud. Defendant claimed a right of way over the land of plaintiff. Plaintiff forbade defendant from going over the land, and locked the gate through which he was accustomed to pass. Defendant took the gate off its hinges, and went through contrary to the prohibition; whereupon plaintiff brought this action. Defendant proved that he and his father had used the way for forty years. Plaintiff proved that defendant had said that plaintiff was very kind to allow him a way over his land, and that he had spoken of purchasing a right of way out from his place. It was also proved that he had made contrary statements, and that all the expressions were used after the way had been used by himself and father for more than twenty-one years. The jury found a verdict for the defendant.

Joseph J. Lewis, for the plaintiff in error.

P. Frazer Smith and William B. Waddell, for the defendant in error.

By Court, **WOODWARD, J.** The law of private ways was well expounded in *Garrett v. Jackson*, 20 Pa. St. 335. Under the

English statute of 2 & 3 Wm. IV., c. 71, enjoyment of a way, as of right, was defined by Lord Denman in *Tickle v. Brown*, 4 Ad. & E. 369, to mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions, of using it, but an enjoyment had openly, notoriously, without particular leave at the time by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether strictly legal by presumption and adverse user, or by deed confirming the right, or though not strictly legal, yet lawful to the extent of excusing a trespass. Though we have no statute on the subject of private ways, except one which forbids their acquisition by prescription, through unimproved woodland, the English statute, as above expounded, is expressive, substantially, of our common law of ways.

The question in this case was, whether there had been such user of the way claimed as to establish the right. There was evidence of its use for forty years and more, and it was properly referred to the jury. But it was in proof by two witnesses that Cloud had several times declared that he held the way by sufferance, and the court is complained of for affirming the defendant's fourth point, to the effect that these declarations were insufficient to divest Cloud's rights.

Twenty-one years of such use and enjoyment of a right of way, as above explained, confers title. Without evidence to explain how it began, such enjoyment is presumed to have been in pursuance of a full and unqualified grant. The owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract, inconsistent with the right claimed by the other party: *Garrett v. Jackson*, 20 Pa. St. 336.

We do not think the owner made such proof here. The declarations of Cloud were equivocal, and inconsistent with his other declarations, which imported an intention to stand upon his legal rights. If any word or act of the owner importing consent or sufferance ever occurred, it was not proved. What Cloud meant when he spoke of sufferance is not clear. He probably meant no more than that he had not been molested. We should overrate his meaning if we construed the expression into a license. Without giving it undue effect, we cannot hold it sufficient to repel the presumption of a grant.

There is nothing else in the case. Taking the charge and answers of the court altogether, the points appear to have been sufficiently noticed, and the plaintiff in error would not probably have been benefited by more explicit answers.

The judgment is affirmed.

RIGHT OF WAY OVER LANDS MAY BE ACQUIRED BY UNINTERRUPTED USES FOR TWENTY-ONE YEARS: *Reimer v. Stuber*, 59 Am. Dec. 744, and classified cases in note thereto 746; *Kilburn v. Adams*, 39 Id. 754; *Stuyvesant v. Woodruff*, 47 Id. 156; *French v. Martin*, 57 Id. 294. The period of time, however, differs, as will be seen by examining the above cases.

AS TO WHAT MUST BE SHOWN TO ESTABLISH PRESUMPTION OF RIGHT OF WAY, see *Worrall v. Rhoads*, 30 Am. Dec. 274, and note 278; *Lawton v. Rivers*, 13 Id. 741; note to *Williams v. Nelson*, 34 Id. 51; *Hall v. McLeod*, 74 Id. 400; *Sims v. Davis*, 34 Id. 581.

THE PRINCIPAL CASE IS CITED IN *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 316, to the point that where one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse, and an uninterrupted enjoyment for twenty-one years is a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant. The use of a road over the land of another, without permission or objection, will raise such presumption: *Wallace v. Fourth Presbyterian Church*, 111 Id. 170.

CRESSMAN'S APPEAL.

[42 PENNSYLVANIA STATE, 147.]

INSTRUMENT REGARDED AS ASSIGNMENT AND DECLARATION OF TRUST. —

Where a mother, entitled to the whole of the property of her intestate son, signed articles of agreement by which, after waiving her right to administration and agreeing that letters issue to her son-in-law, it was agreed that the bulk of the property should be invested, the interest to go to an invalid son, while he lived, and principal to his brothers and sisters upon his death: *Held*, that such instrument must be regarded as an assignment and declaration of trust with a trustee competent to carry it into effect.

AGREEMENT CONSTITUTING DECLARATION OF TRUST IS NOT REVOCABLE at the instance of a party competent to make it merely because some of the *cestui que trust* who joined in the instrument were minors, or under the disability of marriage at the time of its execution.

THE facts are stated in the opinion.

G. R. Fox and George N. Corson, for the appellant.

B. M. Boyer, for the appellees.

By Court, READ, J. The doctrine applicable to this case was discussed in *In re Painter's Estate*, 16 Leg. Int. 76, and to the cases there cited may be added *Scales v. Maude*, 25

L. J., N. S. (Ch.), 433, decided by Lord Chancellor Cranworth, who had joined in the judgment in *Kekewich v. Manning*, 12 Eng. L. & Eq. 120, as one of the lords justices. There letters by a mortgagee to defendants, beneficially interested in the equity of redemption, promising that her executors should cancel the mortgage, and containing words of gift, were held upon appeal, affirming the decision below, to be no defense to a suit of foreclosure by the executors of the mortgagee. "In order to sustain the case of the defendants, they must make out that this is a valid declaration of trust. I do not think it is a declaration of trust at all, and if it were a declaration of trust, it would be invalid as being voluntary. It is not a declaration of trust at all, but it was intended merely to be a direction to the executors. Although she speaks of a gift, there is no gift at all, except a direction to the executors, and that is obviously revocable. . . . Even if it were a declaration of trust, it would be invalid for want of consideration, for a mere declaration of trust by the owner of property in favor of a volunteer is altogether inoperative, and the court will not interfere in such case. The case is different where there has been a change of legal ownership, and so a trust has been constituted. Then the court will inquire what the trusts are, but there is no authority in favor of what the defendants are contending for." *Kekewich v. Manning*, *supra*, referred to by the lord chancellor, was a marriage settlement, where the settler had, by deed, conveyed and assigned her interest, which was all she could do, in a fund to new trustees upon trusts which eventually gave the property to volunteers.

The language of the lord chancellor is too strong, and cannot be considered as a perfectly correct exposition of the law. In *Lambe v. Orton*, decided by Vice-Chancellor Kindersley, on the 26th of January, 1860 (1 Drew. & S. 125), where a letter was written by a nephew to his uncle, who was the executor and trustee of another uncle's will, the first part requesting him to pay to his cousin one-third part of the portion of the personal property to which he was entitled from his late uncle's effects, and the second part requesting him to pay the remaining two thirds of the personal effects due to him from his late uncle to his Uncle George, and to the uncle to whom it was addressed, it was held that the letter was a valid declaration of trust, and assignment of all his interests, immediate and expectant, under his uncle's will, to the parties named in the letter.

Mr. Spence in his very elaborate work on the equitable jurisdiction of the court of chancery, volume 2, page 909, sums up the doctrine, after discussing all the cases prior to 1849, in these words: "On the whole, it appears that the only sure way short of a legal transfer, where that is practicable, of effecting a voluntary transfer to a stranger, is by the party entitled signing a declaration (a deed does not appear to be necessary), declaring a trust in favor of the intended donee." And the same doctrine is stated as the law by Mr. Smith, in the sixth edition of his manual of equity jurisprudence, published during the last year, and which is highly spoken of in England. The American authorities are collected in the notes of Hare and Wallace, to the cases of *Ellison v. Ellison*, 1 White & Tudor's Lead. Cas. Eq., ed. 1859, p. 324, and take the same ground, with a leaning in favor of a wife and child, as forming a meritorious consideration: *Dennison v. Goehring*, 7 Pa. St. 175; 1 Story's Eq. Jur., sec. 170; 2 Id., sec. 973.

Mrs. Elizabeth Cressman had been twice married, and had children by both husbands. Levi Cressman, a son of the second marriage, died from the effects of an accident whilst out gunning, and before his death, directed or desired that his estate, which was personal, and not exceeding five hundred dollars, should be divided amongst his brothers and sisters, excepting fifty dollars of it, which was in the hands of his mother, and which he directed his mother should retain. He died intestate, unmarried, and without issue, and his mother was of course entitled to the whole of his little property, and to the administration. Under the circumstances the mother, desirous of carrying out the will of her son, executed on the 19th of October, 1854, what is styled articles of agreement under seal, the paper not being drawn by counsel, but by a friend of the family. As Mrs. Cressman was the entire owner of the personal estate of her son, and as many of her children were minors or married women, this paper can only be regarded as her own voluntary act, deriving no aid from its execution also by her children. By this deed she waives her right to administration, and agrees that her son-in-law, William M. Lukens, shall take out letters of administration, which was done. The said Lukens is to hold the net estate of the deceased, after paying the fifty dollars thereout to Mrs. Cressman, placing the remainder at interest on good security, paying the interest arising thereon annually, for the benefit of Lewis Cressman, an infirm son; that is, during the lifetime of

his mother said interest to be paid to her in part payment for her keeping of him, and after her decease, or when he shall cease to reside with her, then the said interest to be paid to him, the said Lewis Cressman, during the remaining term of his natural life, and after his decease the principal sum of said estate to be equally divided among the brothers and sisters of the said Lewis Cressman. William M. Lukens, as administrator, filed his account on the 29th of September, 1855, which was confirmed *nisi* on the 14th of November in the same year, and then, as trustee, according to the deed, took the net estate as appropriated by Mrs. Cressman, and as we suppose, placed it at interest on good security, and regularly paid over the interest to Mrs. Cressman, for the benefit of her son Lewis, up to 1860, inclusive. On the 27th of February, 1860, on petition of Mrs. Cressman, the court appointed an auditor to make distribution of the funds. The auditor disregarded the agreement, and gave the funds to Mrs. Cressman. The court reversed the report of the auditor, established the agreement, and made a decree in favor of the persons entitled under it.

After considerable hesitation, we cannot regard his instrument in any other light than an assignment and declaration of trust, with a trustee competent to carry all its trusts into complete effect, without the aid of a court of equity. The fund has been in the hands of the trustee for upwards of seven years, for nearly the whole of which time all parties seemed contented with the arrangement, and its provisions were entirely fulfilled. The court below were therefore right, but we do not commit ourselves to all the reasons assigned by them. As the trust may last for some time, the court should see that the money is properly invested, and if necessary, that the trustee should give security.

Decree affirmed, at the costs of the appellant.

LYCOMING INSURANCE CO. v. SCHREFFLER.

[42 PENNSYLVANIA STATE, 123.]

STATEMENT OF LOSS MADE BY INSURED UNDER OATH according to the requirement of the insurance policy is not admissible in evidence to show the amount or extent of the loss.

ACTS CONSTITUTING WAIVER OF NOTICE "FORTHWITH."—Where an insurance company, after a delayed notice of a fire, sends two agents at different times to ascertain the loss, and with offers to compromise and settle, it has by these acts waived the objection that the notice was not sent

"forthwith," and is estopped from setting it up in an action by the insured for the loss.

GENERAL CHARGE ON POINT RAISED IS SUFFICIENT to substantially comply with the request to charge upon it.

COVENANT. Godfrey Schreffler owned property insured by the Lycoming Insurance Company. On the night of the 13th of April, 1858, this property was destroyed by fire. On the 19th of the same month, Schreffler notified the company of the fact. One of the conditions of the policy was that in case of loss by fire the insured should give notice "forthwith," and within thirty days, make a sworn statement of the loss sustained to the secretary. The company refusing to pay the amount claimed to have been lost, Schreffler brought this suit. To prove the amount lost, the sworn statement was introduced in evidence against the defendants' objection. The company set up in defense that the notice of the fire was not sent to them as required by the policy. The other facts are sufficiently stated in the opinion.

E. P. Dewees, Levin Bartholomew, and F. W. Hughes, for the plaintiffs in error.

James H. Campbell and John Bannan, for the defendant in error.

By Court, THOMPSON, J. In *Commonwealth Insurance Company v. Sennett*, 41 Pa. St. 161, we held it to be error to receive as evidence to go to the jury the statement of the loss made out by the insured under oath, pursuant to the required stipulation also to be found attached to this policy. It can never be evidence of the subject or amount of the loss sustained. Had this decision been known, the error in receiving the plaintiff's statement as evidence, generally, would undoubtedly have been avoided. The fact that it was called for did not make it evidence, as is sometimes the case in regard to papers. The insurers had a right to demand it, under oath, to be used by them for the same purposes as if made without oath, and were no further bound by it. The court committed an error in permitting the statement to go to the jury under the issues in the case, and for this reason the judgment must be reversed.

2. It is not necessary to determine whether the preliminary notice of the fire was in time or not, under the requirement to give it "forthwith." The company acted upon it as received in time; made no objection, until the trial, that five days was too great a lapse of time. They had, in the mean time, sent an

agent, who was also their attorney, to investigate the loss, its extent, and who offered a certain compromise. This being refused, he demanded that the statement of loss should be made out under oath. Previously to this, Hazen, another agent, says he made an offer, on the part of the company, of what they were willing to give to settle the loss, which was also refused by the plaintiff, and that he had been instructed by the company so to do. All this was after notice sent to the company. If it had not been in time, which we do not decide, these acts were sufficient to waive that objection and estop the company from setting it up. The authorities cited by the defendant in error abundantly prove this. The request to charge on the point which raised the question of the sufficiency of notice was, we think, substantially complied with in the general charge, and it was not necessary to repeat it in answer to the point. We see no error in this part of the case, but for the reason already assigned, the judgment must be reversed.

Judgment reversed, and *venire de novo* awarded.

FORMAL PROOFS OF LOSS AS EVIDENCE. — Affidavits and accounts of loss, constituting preliminary proofs furnished by the insured to his company, are evidence that the insured has complied with the policy in this respect, but are not evidence in his favor upon the amount of loss: *Newmark v. Liverpool etc. Fire and Life Ins. Co.*, 77 Am. Dec. 608, and note 611. But in *Moore v. Protection Ins. Co.*, 48 Id. 514, it is held that the preliminary proof of loss, made by an insured in accordance with the conditions of his policy, is admissible in evidence on the question of the amount of such loss.

UNLESS WAIVED BY INSURANCE COMPANY, NOTICE AND PROOFS OF LOSS must be furnished in due time by the assured as a prerequisite to his right of action on the policy: See note to *Smith v. Haverhill Mut. F. Ins. Co.*, 79 Am. Dec. 737.

INSURER, BY RECEIVING NOTICE OF LOSS WITHOUT MAKING OBJECTION to its not being given in time, does not thereby waive such notice: See note to *Smith v. Haverhill Mut. F. Ins. Co.*, 79 Am. Dec. 737.

WHAT DEMANDS WAIVER BY INSURER in defect or insufficiency of notices of loss: *Clark v. New England etc. Ins. Co.*, 53 Am. Dec. 44, and note 52.

NOTICE "FORTEWITH" MEANS WHAT: *St. Louis Ins. Co. v. Kyle*, 49 Am. Dec. 74; *Whitchurst v. North Carolina M. Ins. Co.*, 78 Id. 248.

CITATION OF PRINCIPAL CASE. — As to a waiver of notice of loss and of preliminary proofs in cases where they form a condition of the policy, the principal case was cited generally in *Buckley v. Garrett*, 47 Pa. St. 212. Numerous other cases were also cited.

COMMONWEALTH INS. CO. v. BERGER AND BUTZ.

[42 PENNSYLVANIA STATE, 285.]

"LEVIED ON" AND "TAKEN INTO POSSESSION OR CUSTODY," HAVE SAME MEANING in the clause of an insurance policy, conditioned that the insurance should cease at the time property "shall be levied on or taken into possession or custody," and mean an actual levy and change of possession.

MERE NOTICE OF LEVY WITHOUT TAKING POSSESSION OF GOODS, though good as a levy, will not defeat an insurance policy which provides that it shall cease if the goods "be levied on or taken into possession or custody."

THE facts are sufficiently stated in the opinion.

Edward M. Paxson, for the plaintiff in error.

Aubrey H. Smith, for the defendant in error.

By Court, STRONG, J. The assignments of error in this case raise but one substantial question, and the answer to that depends upon the proper construction of the eleventh condition of the policy of insurance. By that condition, it was stipulated that the policy should cease at and from the time that the property thereby insured should be levied on or taken into possession or custody, under any proceeding in law or equity. The evidence given on the trial in the court below established beyond contradiction that, after the policy was issued, and before the fire occurred, execution against the assured had been placed in the sheriff's hands, and that the sheriff's officer, with the writs, had gone to the store where the insured property was, and there, with the goods in view and in his power, made a memorandum of a levy, and given notice thereof to the defendants in the executions. The goods were not taken into the custody of the officer; they were not left in charge of a watchman, nor was the actual possession of the assured disturbed.

It must be admitted that this was a levy upon the property. Strictly, it is true, a levy is actual seizure; but in this state it has been held that if the officer, with the goods in view and within his power, assert that he makes a levy upon them, his acts are equivalent to a levy. It is neither for him nor for the debtor to deny that an actual seizure has been made. I mean that neither against the creditor nor the debtor can the sheriff deny a levy, nor can the debtor deny it against the claim of the officer. But is merely going to the property, and giving notice of a levy, what was intended in this policy of insurance? Was it the understanding of the parties that the

policy should cease on the occurrence of an act done by a third party, which could not increase the hazard of the insurers, nor take away either his power, or his motives for preserving the property from destruction by fire? We think not. The eleventh condition must have been attached to the policy for at least some supposed substantial reason. Its purpose, doubtless, was to secure the company against any other hazard than that which they at first assumed. To them it was important that while the risk continued, the goods should not be taken out of the possession of the assured. His character for care and caution they estimated when they took the risk, and he was interested in the preservation of the property, for he was in part his own insurer. They could not know what degree of watchfulness would be bestowed by any officer of the law who might dispossess the assured. Certainly he would not have the same motives for guarding and preserving the property which the owner had. It is easy, therefore, to find a reason for providing against an involuntary change of the actual possession, while it is difficult to conjecture what possible injury could have resulted to the company from an act of a sheriff's officer, which left the possession of the assured all undisturbed. Giving, then, to the condition a reasonable construction, such as it may be supposed was intended by the contracting parties, the phrases "levied on" and "taken into possession or custody," have the same meaning. The latter defines the former. Unless it be so, the latter expression is superfluous. Certainly the language of the policy admits of such a construction. It is consonant with what may be supposed to have been the intention of the parties, and even if the construction contended for by the plaintiffs in error were equally reasonable, that must be adopted which is most favorable to the assured, as was said in the *Western Ins. Co. v. Cropper*, 32 Pa. St. 351 [75 Am. Dec. 561]. We think, therefore, the district court took a correct view of the policy, with its conditions, and that none of the assignments of error can be sustained.

The question proposed to William Hinkle, the witness, was of course immaterial, if a mere levy, without taking into possession or custody the insured goods, did not defeat the policy.

Judgment affirmed.

ALIENATION OF INSURED PROPERTY AVOIDS POLICY, WHEN: See note to *Clark v. New England Mut. Fire Ins. Co.*, 53 Am. Dec. 44, and note 52.

LEVY OF EXECUTION NOT ALIENATION OF INSURED PROPERTY AVOIDING POLICY, WHEN: See note *Clark v. New England Mut. Fire Ins. Co.*, 53 Am. Dec. 53.

ACTUAL SEIZURE NOT ALWAYS NECESSARY TO VALID LEVY: *Tyrell v. Tyford*, 31 Am. Dec. 484.

NOTICE OF LEVY ON LAND NEED NOT BE GIVEN BY SHERIFF TO EXECUTION DEFENDANT to constitute valid levy: *Duncan v. Matney*, 77 Am. Dec. 575.

THE PRINCIPAL CASE WAS CITED in *Teutonia Ins. Co. v. Mund*, 102 Pa. St. 94, to the point that if an exception in a policy of insurance be capable of two interpretations, equally reasonable, that must be adopted which is most favorable to the assured, for the language is that of the assurer. The principal case was summarised and followed in *Insurance Co. v. O'Maley*, 82 Id. 403, where the levy was made on real estate. The condition of the policy in this case was precisely the same as the one in the principal case. The fact, said the court, that the levy in the principal case was on personal property cannot change the principle of construction. If there is any difference, the reason would be still stronger in the case of a levy on real estate, which is always a mere technical seizure without any interference with the possession, at least until after sale.

WYNKOOP v. WYNKOOP.

[42 PENNSYLVANIA STATE, 233.]

DUTY OF ADMINISTRATRIX AS TO BODY OF DEAD TERMINATES with the burial.

WIDOW HAS NO RIGHT TO OR CONTROL OVER BODY OF HER DECEASED HUSBAND after the interment.

DISPOSITION OF REMAINS OF DECEASED PERSON AFTER BURIAL belongs thereafter exclusively to his next of kin.

COURT WILL NOT GIVE WIDOW PERMISSION TO REMOVE BODY OF HER HUSBAND from his mother's burial-place in consecrated ground, against the consent of the husband's mother, she being the next of kin of decedent, and especially where the son was buried with the ceremonies of the church and the honors of war.

THE facts are stated in the opinion.

E. P. Dewees and F. W. Hughes, for the appellants.

Benjamin W. Cumming, for the appellee.

By Court, READ, J. So universal is the right of sepulture that the common law, as it seems, casts the duty of providing it, and of carrying to the grave, the dead body decently covered, upon the person under whose roof the death takes place; for such person cannot keep the body unburied, nor do anything which prevents Christian burial; he cannot, therefore, cast it out, so as to expose the body to violation, or to offend the feelings, or endanger the health of the living; and for the same reason, he cannot carry the dead body uncovered to the grave: *Queen v. Stewart*, 12 Ad. & E. 773; S. C., 40 Eng. Com. L.

The executor or administrator must bury the deceased in a manner suitable to the estate he leaves behind him, and such funeral expenses are placed, by an act of assembly, in the first class of preferred debts. Where the body is decently and properly buried in an appropriate place, such as a family vault, or burial-lot in a church-yard, in or near the neighborhood of the residence of the decedent, it would seem that all was performed which the law required from the living. The duty of the executor or administrator is over, and also his rights, except in case of an improper interference with the grave, the body, or the grave-clothes of the deceased. The claims of society have been entirely satisfied. It is of rare occurrence that any dispute arises after the burial, or that any case has been submitted to a court for its decision. The law of burial, in its relations to the place of interment and the protection of the dead body, was discussed at great length by the Hon. Samuel B. Ruggles, in a very learned report to the supreme court of the city of New York, in the matter of the widening of Beekman Street, which took away certain vaults for the burial of the dead, and required the disinterment, and reinterment in some other place, of the dead bodies contained in them. Besides the vaults, the bodies contained in eighty graves, amounting to about one hundred, were all disturbed and removed by the church. In one of the graves lay the body of Moses Sherwood, indicated by a marble head-stone bearing the name of "Sherwood." His daughter, Maria Smith, acting for herself and her sister, and for the descendants of her brothers and sisters, five in all who have died, claimed that the remains of her father be reinterred in a separate grave in such suitable locality as she might select; that the existing monument be erected over such grave; and that the necessary expense be defrayed out of the funds in court. The referee was of opinion that the claim should be allowed, and submitted to the court certain conclusions, of which the second and third were as follows: "2. That the right to bury a corpee, and to preserve its remains, is a legal right which the courts of law will recognize and protect. 3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin."

After hearing counsel upon the report, the court confirmed it in all respects, awarding one hundred dollars to Maria Smith, as next of kin of Moses Sherwood, directing her with that sum to reinter his remains, and erect at his grave the

monument taken in widening the street, and declaring her entitled to the possession of the remains and of the monument for that purpose: 4 Bradf., appendix, 503, 532.

Colonel Francis M. Wynkoop died suddenly, from an accidental gunshot wound, at his residence at Valencia, Schuylkill County, Pennsylvania, on Sunday, the thirteenth day of September, 1857, and was buried in the course of the week in the burial-lot of his mother, Angelina C. Wynkoop, in the Mount Laurel Cemetery, belonging to the rector, church-wardens, and vestrymen of Trinity Church, Pottsville, in the said borough of Pottsville, with military honors, the deceased having served in Mexico in command of a volunteer regiment principally raised in Schuylkill County. Some days afterwards his widow took out letters of administration in Schuylkill County upon her husband's estate. On the 10th of November, 1858, in pursuance of the orders of his widow, the complainant, an undertaker, called on one of the church-wardens for the key of the cemetery, in order to take up and remove the remains of her husband to Laurel Hill Cemetery, near Philadelphia, which was refused, in consequence of a notice from the mother and next of kin of the decedent, and in whose lot he was buried.

On the 30th of the same month, the widow, in her own right and as administratrix, filed a bill in equity in the court of common pleas of Schuylkill County, against Angelina C. Wynkoop (the mother), John E. Wynkoop (a brother), Anna M. Wynkoop (a sister), Thomas J. Atwood, and the rector, church-wardens, and vestrymen of Trinity Church, Pottsville, praying an injunction commanding the mother and the said corporation to permit the plaintiff and her agents to remove the body of the deceased. Upon the hearing on bill, answers, and proofs, the court below decreed that an injunction be issued according to the prayer of the plaintiff against the defendants, from which an appeal was taken by the mother, Angelina C. Wynkoop.

The bill asserts a fixed legal right in the plaintiff in two capacities: 1. As administratrix; 2. As widow. As to the first, the absolute duty to bury terminated with the burial, and no subsequent expenses would be a legal charge upon the estate of the decedent, whether solvent or insolvent; 2. As widow, in this case she would appear to have no rights after the interment. Suppose a woman has had three husbands, who have all died leaving her a widow (*Lawall v. Kreidler*. 3

Rawle, 304), is she to be burdened with the duty and vested with the charge of their three bodies against the expressed wishes of the blood relations and next of kin of each?

But it is said there was an agreement or promise made by all or some of the relatives of Colonel Wynkoop to the plaintiff, when she was evidently laboring under great mental excitement, almost amounting to insanity, in order, as it would appear, to restore her to a state of comparative calmness. The appellant, in her answer, says: "Said complainant asserted that the body of said F. M. Wynkoop should never be buried at all, but that it ever should remain with her." Her nerves were wrought up to the highest state of excitement, and consequently her reason, for the time, was almost shattered. The appellant most positively denies that she ever made any such promise or agreement, and the evidence in the cause does not prove her positive and unqualified assertion to be untrue. This ground therefore fails, and the right of the appellant is founded upon her position as mother and next of kin. Besides the fact that the body of her son is deposited in her burial-place in consecrated ground, and that he was buried with the ceremonies of the church and with the honors of war, is sufficient to justify us in refusing permission to a removal under the circumstances.

We do not think the present case calls for the interference of a court of equity, and therefore, it is ordered, adjudged, and decreed that the decree of the common pleas of Schuylkill County be reversed, and the bill be dismissed.

FOR CITATIONS OF THE PRINCIPAL CASE, see *infra*.

RIGHTS AND DUTIES OF RELATIVES AND OTHERS RESPECTING BODIES OF DEAD. — 1. *Sepulture of Dead* has been regarded in all ages of the world as a religious rite; and the place where the remains of friends have been deposited is always esteemed as consecrated and hallowed. It is true that it was the pride of Diogenes, and his disciples of the ancient school of cynics, to regard burial with contempt, and to hold it utterly unimportant whether their bodies should be burned by fire, or devoured by beasts, birds, or worms; and some of the French philosophers of modern days have, in a kindred spirit, descanted upon the "glorious nothingness" of the grave, and that "nameless thing," a dead body; but the public sentiment, and secular jurisprudence of civilized nations, hold the grave and the dead body in higher and better regard. In France, even, the home of this school of modern philosophy, it has been adjudicated by her secular courts that the land where dead bodies are buried shall not be profaned by culture even of its surface, until the buried dead have mouldered into dust: *Law of Burial*, 4 Bradf., appendix, 523. Cemeteries, as sleeping-places for the dead, have existed from the most remote periods. The Hebrews had their public burial-grounds, and the Greeks,

before they adopted the custom of burning their dead, had their "sleeping-fields" for the sepulture of the dead. In all countries, both ancient and modern, except where incineration is the practice, the first care of a people has always been to select a place for the burial of their dead; and many of these burial-places are immense. In all Christian countries, the practice of burial under and around churches has prevailed to a great extent, and the place of burial is often consecrated, in form, by ecclesiastical ceremonies. And the law of burial, in its relation to the place of interment, and the protection of the dead body, has usually been considered as belonging to that class of topics falling under the consideration of the ecclesiastical courts: Tyler's Am. Ecc. Law, sec. 970. It has been determined in an ecclesiastical court, however, that no mode of burial can be permitted which will prolong the natural decay of the body, or needlessly preserve its identity; that the lapse of a single generation is practically sufficient for mingling human remains with the earth, and destroying their identity; that the dead, having no legal right to crowd the living, each buried generation must give way to its successor, and that, therefore, an iron coffin, which would unduly and unlawfully prolong the period for identifying the remains, is ecclesiastically inadmissible, unless an extra fee be paid to the church: *Gilbert v. Bismard*, 3 Phillim. 335. Most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject. And the right of a person to provide by will for the disposition of his body has been generally recognized. By the canon law, a person had a right to direct his place of sepulture. According to the strict rules of the old common law, a dead man could have no rights; but it will soon be seen that they do at least have the right to be protected, and that the law will, towards that end, extend its protecting hand: *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 239; S. C., 14 Am. Rep. 667.

2. *Civil Law, Canon Law, English Law.* — "By the civil law of ancient Rome, the charge of burial was first upon the person to whom it was delegated by the deceased; second, upon the *scripti heredes*, to whom the property was given, and if none, then upon the *heredes legitimi* or *cognati* in order: Pothier, Pand., Par. ed. 1818, vol. 3, p. 378; Corpus Juris Digest, lib. 11, tit. 7, l. 12, sec. 4. But a body once buried could not be removed except by the permission, in Rome, of the pontifical college, and in the provinces, of the governor: Pothier, *supra*; and Digest, lib. 11, tit. 7, ll. 8, 39 and 40. And by the Roman law, there was a distinction of tombs into *familiaria* into which any member of the family might be admitted, and *hereditaria* for one's self and his heirs: Digest, lib. 11, tit. 7, l. 5. The heirs might be compelled to comply with the provisions of the will in regard to burial: Digest, lib. 5, tit. 3, l. 50. And the pontifical college had the power of providing for the burial of those who had no place of burial in their own right: Taylor's Civil Law, 4to 1755, p. 77. By the canon law, which prevailed in such matters over so large a part of Europe, every one was to be buried in the parish church-yard, or in his ancestral sepulchre, if any, or in such place as he might select. A wife was to be buried with her last husband, if more than one. If a person permanently changed his residence, then he was to be buried in the parish church-yard of his new residence: Corvinus's Jus Canonicum; Voet ad Pandectas, ed. 1731, vol. 1, p. 642. In England, by their ecclesiastical law, by which this subject was regulated, every person, with exception of traitors, etc., had a right to be buried in the parish church-yard. And a claim of right by custom to bury as near relatives as possible was held bad. The whole was under the direction of the ordinary, and was of ecclesiastical cognizance.

And once buried, the body could not be removed without license from the ordinary: 1 Burn's Ecc. Law, 8th ed., 251, 271, 372; *Kemp v. Wickes*, 3 Phillim. 264. And the person who set up a monument, or on his death, the heir of the deceased, might have an action for injury to it: 1 Burn, 373; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. L. 235, 236; S. C., 14 Am. Rep. 667, per Potter, J. The ancient civil courts of England gradually lost their original, legitimate authority over places of interment, as private property, and their necessary and proper control over the repose of the dead. The clergy, monopolizing the judicial power over the subject, burial was committed solely to ecclesiastical cognisance; while the secular courts, stripped of all authority over the dead, were left to confine themselves to the protection of the monument and other external emblems of grief erected by the living. But these were guarded with singular solicitude. The tombstone, the armorial escutcheon, — even the coat and pennons, and ensigns of honor, whether attached to the church edifice or elsewhere, — were raised as "heir-looms," to the dignity of inheritable estates, and descended from heir to heir, who could hold even the parson liable for taking them down or defacing them. But at this point the courts of the common law stopped: Law of Burial, 4 Bradf., appendix, 519.

3. *English Ecclesiastical Law not Applicable in This Country* — *Equity and Courts of Law Take Jurisdiction*. — There are no ecclesiastical courts in this country: *Weld v. Walker*, 130 Mass. 423; S. C., 39 Am. Rep. 465; and "the maxims, doctrines, and practices of those courts ought to be banished from our jurisprudence, and not guide, in any way, our judicial action. An examination of this judicial power will show that it is wholly peculiar to England, and that the decisions and dicta of their courts and legal writers on this subject ought not to exert any controlling influence over our legal tribunals. Burial in the British Islands may possibly remain, for many generations, subject exclusively to 'ecclesiastical cognisance'; but in the new transplanted England of the western continent, the dead will find protection, if at all, in the secular tribunals": Law of Burial, 4 Bradf., appendix, 517, 526. In this country, equity has been invoked to grant such protection and give such remedies as seem to be required by the circumstances, and are in consonance with the feelings of mankind, and has assumed jurisdiction: *Snyder v. Snyder*, 60 How. Pr. 368; *Weld v. Walker*, 130 Mass. 423; S. C., 39 Am. Rep. 465. So have courts of law: *Bogert v. City of Indianapolis*, 13 Ind. 140.

4. *Right of Burial, when Confined to Church-yard* — *Right to Christian Burial* — *Husband must Bury Wife*. — The right of burial, in this country, when confined to a church-yard, as distinguished from a separate independent cemetery, although conveyed with the common formula of "heirs and assigns forever," must, it seems, stand upon the same common footing as the right of public worship in a particular of the church. It is an easement in, and not a title to, the freehold; and must be understood as granted and taken, subject, with compensation of course, to such changes as the altered circumstances of the congregation or the neighborhood may render necessary. Like the sale of a church-pew, which gives the mere right to worship in the particular place while the church stands, and is occupied for religious purposes, the sale of a church vault gives the mere right of interment in the particular plat of ground, so long as that and the contiguous ground continues to be occupied as a church-yard. This is the common doctrine, in the absence of a statute to the contrary: *Richards v. Northwestern P. D. Church*, 32 Barb. 42; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; S. C., 32 Am. Rep. 417. The individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep him unburied, or do any-

thing which prevents Christian burial; he cannot, therefore, cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry him uncovered to the grave. It is probable that, under proper circumstances, a writ of mandate directed to the right person, to compel the burial of such poor person, would issue: *Queen v. Stewart*, 12 Ad. & E. 773; *People ex rel. Coppers v. Trustees of St. Patrick's Cathedral*, 58 How. Pr. 55. A husband is bound to bury his wife: *Jenkins v. Tucker*, 1 H. Black. 91; *Durell v. Hayward*, 9 Gray, 248; *Weld v. Walker*, 130 Mass. 423; S. C., 39 Am. Rep. 466; *Ounningham v. Reardon*, 98 Mass. 538. If a husband, by his cruelty, compels his wife to leave him, and makes no provision for her afterwards, and she dies while so apart, he is liable for the reasonable expenses of her funeral, without notice of the death: See case last cited. And where a husband has gone abroad, leaving his wife, who dies in his absence, a third person who voluntarily pays the expenses of her funeral, suitably to the rank and fortunes of the husband, though without his assent, may recover of him the money so paid: *Lake v. Ames*, 10 Cush. 221; *Jennings v. Tucker*, 1 H. Black. 91. So a husband, who has buried his wife in a public burial-ground, is not liable as a trespasser for removing a grave-stone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. The indisputable and paramount right, as well as duty, of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well-known and long-established usage of the community: *Durell v. Hayward*, 9 Gray, 248.

5. *Right of Burial—Right to Select Place of Burial.*—It is asserted in many cases, following the Roman law, that the exclusive right of burial, and the right to select the place of burial, rests, in the absence of any testamentary direction on the part of the deceased, in the next of kin. And this right to bury a corpse and to preserve its remains is one which both courts of law and equity will recognize and protect, in the absence of such testamentary disposition. The right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure: *Snyder v. Snyder*, 60 How. Pr. 370, citing the principal case; *Bogert v. City of Indianapolis*, 13 Ind. 140, note; *Law of Burial*, 4 Bradf., appendix, 532; *Tyler's Eco. Law*, sec. 971; *Rousseau v. City of Troy*, 49 How. Pr. 496. For curious and interesting discussions and notes to cases upon the subject, see also *In re Bettison*, 12 Eng. Rep., Moak's Notes, 656; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 237; S. C., 14 Am. Rep. 667. Most of the cases there referred to arose with respect to the right to protect the place where the remains were buried, to prevent a disinterment, or to collect from the executors, husband, or relative of the deceased the expenses of the funeral. In the absence of a contention prior to burial as to the right between relatives to designate the place of burial, the broad doctrine that the right rests exclusively with the next of kin can hardly be considered as a judicial exclusion of the right of the widow. The words "next of kin," used *simpliciter*, without anything in the context to indicate a different meaning, mean those of the kindred or blood, excluding the widow: *Stosson v. Lynck*, 43 Barb. 147. It is, however, otherwise as to statutes in which the intent is plain that the widow is included: *Snyder v. Snyder*, 60 How. Pr. 370, citing *Merchants' Ins. Co. v. Hinman*, 32 Barb. 410; *Green v. Hudson R. R. Co.*, Id. 25. The fee-simple of an estate in land may be acquired for the purposes of sepulture, and when converted to that use, the title may descend, or be

again the subject of sale. The common cemetery is subject only to a temporary appropriation, and yet there may be a grant of an exclusive title to a part of the public cemetery from the proper authority; a vault or a grave is simply a place to entomb, a receptacle for the dead, a last resting-place, and a grant for such a place may be exclusive and perpetual: *In the Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155. We have an instance of this in the case of Abraham's purchase of the cave in the field of Macphelah, which was "for a possession of a burying-place," and it inured to the purchaser and his heirs even to the fourth generation: Gen. xxiii. But a receipt for money from the superintendent of a Catholic cemetery, in payment for a plot of ground, is not an instrument operating as a conveyance or grant to the one thus paying and obtaining a receipt. It simply operates as a certificate of his right to use the lot for burial purposes only, conformably with the established by-laws of the corporation, in so far as they are not in violation of any law. Accordingly, where such person died a member of the Masonic fraternity, and the rules of the cemetery prohibited the burial of such member therein, it was held that an application for a *mandamus* to compel the trustees to cause a grave to be opened in said lot for the burial of such person therein should be denied, notwithstanding the usual charges for digging the grave had been accepted by the cemetery officers, and that the mother, wife, sister, and two children of such person, all Catholics, were already buried in the lot: *People v. St. Patrick's Cathedral Trustees*, 21 Hun, 184; reversing same case, 7 Abb. N. C. 121; 58 How. Pr. 55.

6. *Contentions and Preference as to Disposition of Remains.*—The person having charge of the remains of a deceased person holds them as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them. In case of a contention as to the place of burial, or other questions, courts will assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as will be best and right under all the circumstances: *Pierce v. Proprietors*, etc., 10 R. L. 227; S. C., 14 Am. Rep. 667; *Weld v. Walker*, 130 Mass. 422; S. C., 39 Am. Rep. 465; *Snyder v. Snyder*, 60 How. Pr. 371. Thus, in a contention between the widow of the deceased, who was his second wife, and his only son and heir, being the child of his first marriage, as to the disposition of his remains, the court held, after taking into consideration all the circumstances, that the claim of the son was to be preferred: See case last cited. A license from a mother to a son to open the family tomb to deposit the corpse of a deceased son, will be implied from the relation of the parties, the exigencies of the case, and the usages and customs of a civilized community: *Lakin v. Ames*, 10 Cush. 198.

7. *Property in Dead Bodies and to Whom It Belongs.*—By the old English law, the body was not recognized as property, but the charge of it belonged exclusively to the church and the ecclesiastical courts, as did also the administration of estates. So while there was property in the burial-lot, in the monuments, and in the ornaments and decorations of the deceased or his grave, there was none in the remains themselves: 2 Bla. Com. 429; note to *Pierce v. Proprietors*, etc., 10 R. L. 237; S. C., 14 Am. Rep. 667; and there are some decisions to the same effect in the United States: *Snyder v. Snyder*, 60 How. Pr. 368; *Meagher v. Driscoll*, 99 Mass. 284; *In the Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155; for it is said that after burial the body becomes a part of the ground to which it has been committed; "earth to earth, ashes to ashes, dust to dust": *Meagher v. Driscoll*, 99 Mass. 284. These notions, however, may possibly be borrowed from the ecclesiastical

law, and arise from a false and needless assumption in holding that nothing is property that has not a pecuniary value. "The real question is not of the disposable, marketable value of a corpse or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order to decently bury it, and secure its undisturbed repose. The dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any judicial precedent. Our courts of justice should place it, at once, where it should fundamentally rest forever, on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection by every consideration of feeling, decency, and Christian duty. The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body?" *Per* Ruggles, referee, in *Law of Burial*, 4 Bradf., appendix, 529. Accordingly, it has been held that, while a dead body is not property in the strict sense of the common law, it is a *quasi* property, over which the relatives of the deceased have rights which our courts of equity will protect: *Weld v. Walker*, 130 Mass. 423; *Pierce v. Proprietors, etc.*, 10 R. I. 227. And in Indiana, a court of law has cut loose all ecclesiastical ties, and held that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and to be disposed of as they may deem fit, but subject to such burial regulations as are reasonable and proper for the public health and advantage. The burial, however, cannot be taken out of their hands, they being able and willing to perform it: *Bogert v. City of Indianapolis*, 13 Ind. 134, 140. And further, a sort of right of custody over or interest in the dead body, in the relatives of the deceased, is recognized in the statutes of many of our states: See *Pierce v. Proprietors, etc.*, 10 R. I. 239; S. C., 14 Am. Rep. 667, and statutes there cited. The subject of property in dead human bodies is discussed at length in 4 Alb. L. J. 56, 57; 6 Id. 151-154.

8. *Contentions concerning Removal of Dead Bodies.* — When a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority: *Weld v. Walker*, 130 Mass. 423; S. C., 39 Am. Rep. 465, and citing the principal case; *Regina v. Sharpe*, Dears. & B. 160, 163; S. C., 7 Cox C. C. 214, 216; *Pierce v. Proprietors, etc.*, 10 R. I. 227; S. C., 14 Am. Rep. 667; and it makes no difference that the motive of the person removing the body was pious and laudable: See cases last cited. Thus, where the deceased, at her request and with the concurrence of all her children except one, was buried in her sister's lot, it was held that that one child or his executors could not remove her remains to another place of sepulture: *Lovrie v. Platt*, 11 Phillim. 303. So in *Pierce v. Proprietors, etc.*, 10 R. I. 227, S. C., 14 Am. Rep. 667, the widow, after burial, was required at the suit of the son to restore the remains of her husband to the burial-lot in which they had been interred upon his death, with her consent and the consent of his children, and from which she had removed them without their consent, for the purpose of interment elsewhere. And if a husband has not freely consented to the burial of his wife in a lot of land owned by another person, with the intention or understanding that it should be her final resting-place, a court of

equity may permit him, after such burial, to remove her body, coffin, and tomb-stones to his own land, and restrain that person from interfering with such removal: *Weid v. Walker*, 130 Mass. 422; S. C., 39 Am. Rep. 465. But while the courts will intervene to protect the grave where the remains lie, they are slow to permit, against the objection of the relatives, a removal after they are once buried: *Snyder v. Snyder*, 60 How. Pr. 371, citing the principal case. But the legislature has power to authorize the removal of the remains of the dead from cemeteries, and may delegate such power to municipalities: *Craig v. First Presbyterian Church*, 88 Pa. St. 42; S. C., 32 Am. Rep. 417. The courts in this country and in England interfere by injunction to prevent removal: *Snyder v. Snyder*, 60 How. Pr. 368; *Pierce v. Proprietors, etc.*, 10 R. I. 237, 242; S. C., 14 Am. Rep. 667; *Church v. Church*, 2 Brewst. 372. The injunction operates to preserve "the repose of the ashes of the dead, and the religious sensibilities of the living." A place of burial, however, may be taken for a public use, and in case of a disturbance the owner of the grave, or next of kin, may be and no doubt is entitled to compensation for the expense of removing and suitably reintering the remains; but no injunction can issue to prevent the disposition of the soil, and the removal of the remains therein deposited, should the court, on application by the officers of the church, deem such disposition proper, and order it accordingly: *Richards v. Northwest etc. Church*, 32 Barb. 42; *Law of Burial*, 4 Bradf., appendix, 532.

9. *Disturbance of Graves, and Wrongful Removal of Bodies—Other Matters.* It was a misdemeanor, at common law, to remove a body without authority. And it was a felony to steal the shroud or apparel: See note to *Pierce v. Proprietors etc.*, 10 R. I. 237; S. C., 14 Am. Rep. 667, and cases therein cited; *Thompson v. Hickey*, 8 Abb. N. C. 159, 168. The offense was indictable, although the motive might have been good: *Rea v. Sharpe, Deans. & B.* 160; S. C., 7 Cox C. C. 214. Taking up dead bodies, even though for the purpose of dissection, was then, and is now, an indictable offense: *King v. Lynn*, 2 Term. Rep. 733; S. C., 1 Leach C. C. 497; *People v. Dalton*, 58 Cal. 228. The selling or disposing of a dead body for gain or profit was also a misdemeanor at common law, and indictable: 3 Jacob's *Fisher's Digest*, 3507. The taking up of dead bodies for dissection is a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. So in this country, statutes have been passed in a number of the states declaring such an act criminal and punishable with heavy penalties: Chase's *Blackstone*, 537, note. But there are circumstances under which the removal of a body from the grave is not an offense under such a statute. Thus, A had a child with a broken thigh-bone, and employed B, a physician, to treat it. The child died, from some cause, about sixteen months after receiving the injury. Before death, B had treated the child for a fracture of the thigh-bone; and before the child's death, had sued to recover for his services. A set up malpractice on the part of B as a defense. During the pendency of the action the child died, and was buried. Subsequently, the father, acting under the advice of his counsel, directed and allowed C, another physician, to cause the body of the child to be exhumed, and a portion of the thigh-bone to be removed, in order that it might be used in evidence on the trial of the question of malpractice. After the bone was removed, the body was returned to the grave. C was arrested for removing the body from the grave, but on examination was discharged. He then brought an action to recover damages for a malicious prosecution, and it was held that C had not removed the body from the grave "for the purpose of dissection, or from mere wantonness," as these terms were used in the statute for a viola-

tion of which he had been arrested, nor had he committed any offense against public decency or the spirit of the statute: *Rhodes v. Brandt*, 21 Hun, 1. In ancient, and even in modern, times, it was the practice to arrest and detain dead bodies for debt: See note to *Pierce v. Proprietors, etc.*, 10 R. I. 237; S. C., 14 Am. Rep. 667. An action of trespass will lie for defacing a monument: *Id.* And trespass *quare clausum* will lie for disinterring: *Meagher v. Driscoll*, 99 Mass. 284.

It is the duty of the executor, or some one on behalf of the estate, to see to the funeral rites; in fact, it has been expressed that the executor must bury the deceased. The estate in the hands of the executor is bound for the expenses, and the law will raise an implied promise on the part of the executor or administrator to pay those who supplied the necessary expenses, so far as he has assets in his hands: See note to *Pierce v. Proprietors, etc.*, 10 R. I. 238; S. C., 14 Am. Rep. 667; *Hagood v. Houghton*, 10 Pick. 154. To cast a dead body into a river, without the rights of Christian sepulture, is indictable as an offense against common decency: *Kanavan's Case*, 1 Greenl. 227. But a parent who has not the means of providing burial for the body of his deceased child is not liable to be indicted for a misdemeanor in not providing for its burial, even though a nuisance is occasioned by allowing the body to remain unburied, and although the poor-law authorities have offered him money to defray the expenses of burial, by way of loan, as he is not bound under such circumstances to contract a debt: *Regina v. Fann, Temp. & M.* 632; S. C., 2 Den. O. C. 325. It may be said in conclusion that in *In the Matter of Widening Beekman Street*, 4 Bradf. 503-532, Hon. S. B. Ruggles, referee, after an elaborate review of the law of burial, arrived at the following conclusions: 1. That neither a corpse nor its burial is legally subject, in any way, to ecclesiastical cognizance nor to sacerdotal power of any kind; 2. That the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect; 3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin; 4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure; 5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering their remains. This report was subsequently confirmed by the supreme court of New York, and it thus received the sanction of judicial authority. These conclusions are quoted in full in the notes to *In re Bettison*, 12 Eng. Rep., Moak's Notes, 659, *Bogert v. City of Indianapolis*, 13 Ind. 140, 10 Alb. L. J. 70, 71, in an article on the "legal custodian of deceased bodies, who is." In this article, one conclusion reached by the writer is, that during her lifetime the widow of a deceased husband has the direction and control of place of interment, and so the husband over his wife's remains. But in the face of the authorities above given, we doubt the soundness of such conclusion in its unqualified form.

MACKASON'S APPEAL. BARTRAM'S ESTATE.

[42 PENNSYLVANIA STATE, 230.]

VOLUNTARY CONVEYANCE IS VOID AS AGAINST CREDITORS, where the grantor settles his property in trust for his own use for life, and over to his appointees by will.

OWNER CANNOT DISPOSE OF PROPERTY IN TRUST FOR HIS OWN USE so as to put it beyond the reach of liability for his future debts.

PROPERTY SETTLED IN TRUST TO ONE'S OWN USE, AND OVER TO APPOINTEES NAMED in a will, becomes assets in the hands of the trustees, applicable to the extinguishment of creditors' claims.

CERTIORARI. The facts are stated in the opinion.

George W. Biddle and James W. Paul, for the appellant.

W. J. McElroy, for the appellee.

By Court, THOMPSON, J. This appellant claims the money in controversy here under the following circumstances: William H. Bartram, a resident of the city of Philadelphia, was the owner of certain real estate in the city; and being so, did, on the eighteenth day of May, 1849, convey the same in trust to his own use for life, and over to such person or persons as he should by will appoint; and on failure to appoint, then to the use of his lawful heirs in fee; the trustees to let and demise the property, receive and collect the rents and income, and pay over the same, after deducting taxes, repairs, and expenses of the trust, to him, the said William H. Bartram, during his life, as received, and not by way of anticipation, and free and clear of all debts, contracts, and encumbrances incurred or entered into by him. Bartram died abroad in 1857, leaving a will, in which he devised his property to the appellant, Ann Mackason, for life, then over to certain persons named. In a codicil to the will, he declares these devises as an execution of the power to appoint.

At the date of the conveyance in trust, Bartram was indebted to a considerable extent, and the property conveyed was sold by the trustees, and after paying off these debts, the residue was invested, and the income paid to him by them annually during life. Before his death, he again became indebted to several persons, in all to the extent of about six thousand dollars, and these debts remained unpaid at his decease. His creditors now claim payment out of the trust funds in the hands of the trustees, which they contend are assets of his estate applicable to their extinguishment, and this

is denied and resisted by the appellant. The court below confirmed the auditor's report, deciding in favor of the creditors, and hence this appeal.

This statement brings us to the simple inquiry, Can the owner of property so dispose of it, for his own use, benefit, and support, as to put it beyond the reach of liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason therefor, excepting to withdraw it from such liability, and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds. Every man about to engage in business where there was a chance of loss would place himself under the pupilage of trustees, and everybody's estates would be passing under settlement deeds and trustees' accounts through the courts, before, in the natural course of things, the jurisdiction of the orphans' court would attach.

Such consequences from judicial action need not be deprecated in advance, for they never can occur.

We need not discuss all the positions taken by the learned auditor in his very able report, all of which converge to the same point; namely, that such a trust as this, under its circumstances, does not withdraw the property from the reach of creditors subsequent to its creation.

Chancellor Kent, in volume 4, page 311, of his Commentaries, states the law of such an attempt thus: "The policy of the law will not permit property to be so limited as to remain in the grantor for life, free from the incidents of property, and not subject to his debts."

So in *Johnston v. Harvey*, 2 Penr. & W. 82, Gibson, C. J., states the same thing to be law, and the reasons for it, viz.: "That the statute of 13 Elizabeth, which proposes to avoid conveyances with intent to delay, hinder, and defraud creditors, would be of little use if a debtor might put his estate beyond the reach of his creditors and still get a living from it." He puts it upon the statute of 13 Elizabeth as void.

Under our insolvent laws, such a thing could not be done, for the debtor is bound to take an oath that he has not conveyed, transferred, or assigned any portion of his property whereby to benefit himself or his family. While this could not affect trusts lawfully made, on good consideration, it certainly would a trust for the debtor's own use.

What object there could have been here for this extraordinary settlement other than to protect the settler's property against future indebtedness, does not appear.

That object is boldly avowed. The trustees are to hold the estate of the settler to his use for life, free and clear of his debts, contracts, and encumbrances, and pay him the net income after his death to his heirs, in default of appointment; otherwise, to his appointee.

The proposition is, that such a settler may be the complete equitable owner of all his property,—deal as much as he pleases with it, and it shall not be liable for his debts. Here we have a direct attempt by one *sui juris* to guard his own property against his own contracts. In *Thomson v. Dougherty*, 12 Serg. & R. 448, decided at *nisi prius*, a conveyance in favor of the wife, of the grantor's whole estate (and that seems to be the case here), with an expectation of future indebtedness, was held void under the statute of 13 Elizabeth as against such debts. There are numerous English decisions cited by the auditor to show that a settlement is fraudulent under the statute of 13 Elizabeth, where the settler takes back to himself an estate for life: *Hayward v. Hammond*, 1 Atk. 13; *Stileman v. Ashdown*, 2 Id. 480; *Fitzer v. Fitzer*, Id. 512; *Taylor v. Jones*, Id. 600; *Tarback v. Marbury*, 2 Vern. 510. This is just what was in substance said by Chancellor Kent, and Gibson, C. J., cited above.

The general doctrine of settlements by one in favor of another who is usually *non sui juris*, fairly made, and without wrong to the creditors of the grantor, the law sustains; but that is widely different from this case. The auditor was therefore right in holding the estate of Bartram in the hands of his trustees for the payment of his debts. We do not negative another ground taken in the report, viz., that an unlimited right of appointment in fee renders the estate assets for the satisfaction of the appointee's debts. This is, undoubtedly, the English rule: See authorities cited by the auditor; and *Holday v. Peters*, 28 Beav. 354. The rule seems to be different when the appointee is a *feme covert*, unless, as said by Sir John Romilly, master of the rolls in this last case, when the *feme covert* is guilty of a fraud in her contracts, by holding herself out as a *feme sole*,—in that case, the property would be assets. It is not necessary to decide upon the effect of such a power to appoint by a man or woman, in this case, nor do we give any intimation on the subject; the case was

well decided by the auditor on the point already stated in this opinion.

Decree of the common pleas affirmed, at the costs of the appellant.

VOLUNTARY DEED INTENDED TO PLACE GRANTOR'S PROPERTY BEYOND REACH OF HIS CREDITORS IS VOID: *Hudnal v. Wilder*, 17 Am. Dec. 744; *Whittlesey v. McMahon*, 26 Id. 382. So with a deed of trust: *Hempstead v. Johnston*, 65 Id. 458. As to when voluntary conveyances in trust, or otherwise, are fraudulent as to creditors: See *Cook v. Johnson*, 72 Id. 381, and note 384.

THE PRINCIPAL CASE WAS CITED in *Loyd v. McCaffrey*, 46 Pa. St. 415, to the point that a man cannot settle his own property to his own use, until a creditor shall assent it, and then over so as to prevent the creditor from seizing it.

PENNSYLVANIA R. R. Co. v. VANDIVER.

[42 PENNSYLVANIA STATE, 385.]

PRIVATE CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS within the scope of their authority, in the same way as any individual person is.

RAILROAD COMPANY IS LIABLE FOR INJURIES TO PASSENGER, CAUSED BY CONDUCTOR'S NEGLIGENCE or violence in removing him, upon refusal to pay his fare.

EVIDENCE THAT PASSENGER ON RAILROAD TRAIN WAS REMOVED FROM CAR BY CONDUCTOR, that he fell on the road and hurt his head and back and that he died from the effect of these injuries, is sufficient to justify the court in letting the question of the cause of the death go to the jury, and in refusing to instruct the jury "that under all the circumstances of the case their verdict should be for the defendant," the railroad company.

VANDIVER was a passenger on the line of the Pennsylvania Railroad Company. He failed to pay his fare, and the conductor took him to the rear of the car and assisted him off. He was somewhat under the influence of liquor at the time. In getting from the car to the ground he fell across one of the rails and struck his head and shoulders upon the ballasting of the road. He got up, went after his hat which had blown down the embankment, pitched headlong down it himself, and lay there from four o'clock till sundown. He was picked up, hurt and sore, and sent home where it was found that his head and shoulders were badly bruised. He died in nine days after the injuries were received, and his wife, Sarah Vandiver, brought this action for his loss. The defendant asked the court to instruct the jury that "under all the circumstances of this case the verdict must be for the defendant"; but the

court refused to do so. The court instructed the jury that, under the circumstances, the company was liable for the acts of their agents. The jury found a verdict for the plaintiff, and defendant sued out a writ of error.

William Darlington, for the plaintiff in error.

By Court, READ, J. A great deal of the difficulty originally felt in holding corporations liable for the acts of their agents within the scope of their authority, arose from the supposition that it was necessary their appointment should be under the seal of their principals. The decisions both in England and America have satisfactorily disposed of this technical doubt, and it is now clearly the law, particularly with regard to what are called trading corporations, that no such evidence of authority is required. A private corporation is liable for the acts of its agents within the scope of their authority, in the same way, and it would appear in the same form, as any individual person is.

"A master," says Smith, in his *Master and Servant*, second edition, page 183, "is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being *respondeat superior*, and that before alluded to, *Qui facit per alium, facit per se*. This rule, with some few exceptions, which will hereafter be pointed out, is of universal application, whether the act of the servant be one of omission or commission, whether negligent, fraudulent, or deceitful, or even if it be an act of positive malfeasance, or misconduct, if it be done in the course of his employment, his master is responsible for it *civiliter* to third persons." At page 187, citing several English and American authorities, he says: "Actions against railway and steam-packet companies also necessarily involve similar principles, as such companies can only act through the instrumentality of servants."

In *Philadelphia, Wilmington, and Baltimore R. R. Co. v. Quigley*, 21 How. 202, the supreme court of the United States held that an action on the case for a libel could be brought against a corporation; and Mr. Justice Campbell, in delivering the opinion of the court, thus defines its liability for the acts of its agents: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations, which are established

for the corporation by their governing body, and their agents, with natural persons with whom they are brought into contact or collision. The result of the case is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents of nearly every variety." Similar doctrine is maintained in Addison on Wrongs, pp. 721, 722. In *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465 [64 Am. Dec. 83], it was held that a corporation may be sued for an assault and battery committed by their servant acting under their authority. There the conductor put out a passenger who had paid his fare, and the court ruled that if the company gave the conductor the power to act according to his discretion in all such cases as should arise, and in the exercise of that discretion he wrongfully exercised the power or removed a passenger, it would be the act of the company, and they would be liable. In this case, the suit was against the corporation and the conductor. The court held the joinder was right, and although the conductor was acquitted, they would not interfere with the verdict against the company. The English cases prior to 1860 are collected in a convenient form in a leading article in 6 Jur., N. S., pt. 2, p. 143.

"The old doctrine that a corporation aggregate has no soul, and therefore is incapable of a malicious intention, has been described by Erle, C. J., as being rather quaint than substantial; and accordingly, in these days, when substance is preferred to form, and utility to quaintness, it has been held that corporations, especially those of a trading character, have souls, and may therefore be guilty of malice. The number and importance of corporate bodies established for the purpose of trade in modern times, and transacting their business through the agency of servants, have rendered it necessary to relax the old rules existing on the subject, and to extend to them the maxim *respondeat superior*, as if they were private individuals; the only special limitation ingrafted upon their liability being that the act complained of should be within the scope and purpose of the incorporation. Thus, after being liable to an action for a false return to a *mandamus*: *Yarbor-*

ough v. *Bank of England*, 16 East, 6; for the negligence of their servants: *Scott v. Mayor etc. of Manchester*, 2 Hurl. & N. 204; S. C., 3 Jur., pt. 1, p. 590; for an assault: *Eastern Counties R'y Co. v. Broom*, 6 Ex. 314, 315; S. C., Jur., pt. 1, p. 297; for false imprisonment: *Chilton v. London and Craydon R'y Co.*, 16 Mees. & W. 212; to an indictment for non-feasance: *Queen v. Birmingham and Gloucestershire R'y Co.*, 3 Q. B. 223; and for misfeasance: *Queen v. Great North of England R'y Co.*, 9 Id. 315; S. C., 10 Jur., pt. 1, p. 755,—it was decided that an incorporated company might be sued for a libel contained in a message transmitted by their telegraph, the company being incorporated for the purpose (*inter alia*) of transmitting messages: *Whitefield v. South-Eastern R'y Co.*, 4 Jur., N. S., pt. 1, p. 683; and that they might also be guilty of acts maliciously committed with a view to injure individuals or rival companies: *Green v. London General Omnibus Co.*, 6 Id. 228." So in *Cowley v. Mayor etc. of Sunderland*, 30 L. J. Ex. 127, February 5, 1861, the corporation were held liable to an action for an injury done by a wringing-machine erected by them, placing them on the same footing as an individual under such circumstances.

These cases have been followed by two very important cases decided in the courts of exchequer and queen's bench, in the beginning of the last year. The first, *Seymour v. Greenwood*, was decided on the 22d of January, 1861, and is reported in 30 L. J. Ex. 189, and was affirmed in the exchequer chamber, Id. 327.

In this case, the plaintiff was a passenger in the defendant's omnibus, and was removed by the conductor, a servant of the defendant, in such a manner that the plaintiff fell into the road, and was severely injured. The allegation was that the plaintiff was drunk, and refused to pay his fare; and the court thought the conductor was obeying the lawful commands of his master in removing a troublesome passenger. The conductor went into the omnibus and took the plaintiff, who was inside, by the collar, with both hands, and backed himself out of the omnibus, drawing the plaintiff along with him. The plaintiff was then on the step, and the conductor on his feet in the road; and he then threw the plaintiff on to the road to the right hand. The omnibus was stopped when he threw the plaintiff down. The plaintiff fell, the conductor did not. A hansom cab came up in the same direction as the omnibus, and the driver tried to draw up, but something under the cab caught the plaintiff, and the cab went over his foot and struck

his head at the same time. Pollock, C. B., said: "I do not believe he intended to do any mischief, but his want of care clearly was the cause of the mischief, and therefore I think the effect of the evidence is that the servant, by carelessly executing his master's commands, caused the mischief complained of, and that is what I should have found had I been on the jury. There is no doubt that the law on this subject was once very much confused, and when *McManus v. Crickett*, 1 East, 107, was decided, the law had not been settled. I think the view we take of this case is quite in conformity with all the more recent decisions. Public safety and private convenience require that we should so decide; for if we were to hold that a railway company is not to be responsible for the act of its servant causing damage to a third person, unless it be an act done in the mere negligent obedience to the orders of the company, there would be no protection to the public."

"I have no doubt," said Martin, B., "that if the conductor used unnecessary violence in removing the plaintiff, the master would be responsible. If, by an act done by a servant, within the scope of his ordinary employment, another person is injured, that person may maintain an action against the master; and the act of removing the plaintiff from the omnibus was within the scope of the conductor's ordinary employment. . . . The criterion is not whether the master has given the authority to do the particular act, but whether the servant does it in the ordinary course of his employment."

The plaintiff died while the rule to set aside the verdict was pending, and the court ordered the judgment to be entered in his name, *nunc pro tunc*, as of Easter term, when he was living.

In *Goff v. Great Northern R'y Co.*, 30 L. J. Q. B. 148, February 13, 1861, the written opinion of the court was delivered by Mr. Justice Blackburn, in which the prior decisions on the subject were deliberately and carefully reviewed. It was held that "a railway company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that the authority should be under seal." Then as to the evidence of such authority, it was held that the doctrine enunciated by the court of exchequer chamber in 1853, in *Giles v. Taff Vale R'y Co.*, 2 El. & B. 822, gave the correct rule, and all prior decisions conflicting with it were considered as overruled on that point. It is not necessary to enter into this question,

as in the present case it was proved by the defendants that they had expressly authorized and instructed their officers or agents to put passengers out of their cars in cases like the present.

Two errors only were argued or pressed by the counsel of the plaintiffs in error. About the first alleged error that the court erroneously held that the company were liable for the acts of their agents in this case, there can be no doubt that the court below were right in their exposition of the law, which is in strict conformity with the authoritative statement of the law by the latest and best authorities, and is founded upon the clearest principles of public policy and private convenience. A railway company selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent, and humane men. In the present case, the company and its agents were all liable for the injury done to the deceased.

The other error, that the court should have instructed the jury to find for the defendants, is not sustained, and I think the court went further in expressing their opinion upon the evidence than I would have done; for it appears to me that there was persuasive evidence sufficient to convince a jury that the deceased died of the wounds which he received when his hands were forcibly removed by the agent, and he fell on the track of the road, between the rails, on the ballasting. There was therefore no error committed by the court, and we do not see that the former reversal on the question of damages has materially improved the condition of the defendants, and it would hardly be to their interest to have another trial.

Judgment affirmed.

CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS done within the scope of their authority: *Ohio etc. Trust Co. v. Merchants' etc. Trust Co.*, 53 Am. Dec. 742; *New York etc. Telegraph Co. v. Drybury*, 78 Id. 338; and their negligence is its negligence: *Hopkins v. Atlantic etc. R. R. Co.*, 72 Id. 287, and note 295.

PASSENGER ON RAILROAD TRAIN WHO REFUSES TO PAY HIS FARE MAY BE REMOVED, ETC.: *State v. Overton*, 61 Am. Dec. 671; but he must be ejected at a regular station, and not elsewhere: *Chicago etc. R. R. Co. v. Paris*, 68 Id. 562, and extended note thereto 570-573, on expulsion of passengers; note to *Hagan v. Providence etc. R. R. Co.*, 62 Id. 333.

RAILROAD COMPANY IS LIABLE FOR INJURY CAUSED BY NEGLIGENCE OF ITS SERVANTS: *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 586, and collected cases in note 539.

THE PRINCIPAL CASE WAS CITED in the following authorities, and to the point stated: The whole power and authority of a railroad corporation is vested in its officers; and as to passengers on board, they are to be considered as the corporation itself. The consequent authority and responsibility are

not generally to be impaired by any arrangement between the corporation and the officers. The corporation is responsible for the acts of the officers, in the conduct and government of the train, towards the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train: *Bass v. Chicago etc. R'y Co.*, 36 Wis. 463. A master is liable for a wrong done by his servant, whether through negligence or the malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured: *Craker v. Chicago etc. R'y Co.*, Id. 675, which was an action for insulting, violent, and abusive acts alleged to have been done to the female plaintiff, by the conductor of one of defendant's trains, while plaintiff was a passenger on such train. It would seem from this case that the master should be liable in all cases for the servant's wrongful act done in the course of his employment, whether through negligence or malice. The principal case was commented upon in *Evansville etc. R. R. Co. v. Baum*, 26 Ind. 74, as being opposed to the doctrines there held, viz.: That a master is ordinarily responsible for the consequences resulting to others from the negligence or want of skill with which his employees do his business. But for a willful and malicious trespass of a servant, not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for his master, no action will lie against the master. Yet if the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose, then it is implied in the employment, and the master is liable, though the servant may have executed it willfully and maliciously. And it was held that these rules apply to corporations as well as to private individuals.

COMMONWEALTH EX REL. JOHNSON v. HALLOWAY. SAME EX REL. LANGHAMMER v. HALLOWAY.

[42 PENNSYLVANIA STATE, 446.]

ACT SHORTENING CONVICT'S TERM OF IMPRISONMENT BY GIVING CREDITS for good conduct is unconstitutional as interfering with the judgments of the judiciary.

COURT WILL NOT CONTROL DISCRETION OF PRISON INSPECTORS, and compel them to discharge prisoners, even though they have served periods which together with their credits for good conduct, entitle them to release under the law.

HABEAS CORPUS by Johnson and Langhammer, two prisoners in the state penitentiary, who claimed discharge under "An act relative to prison discipline," which provided for a "graduated deduction from the term of sentence," for good conduct.

By Court, **WOODWARD, J.** A penitentiary on the principle of solitary confinement of convicts was first provided for in Pennsylvania by an act of assembly of the 3d of March, 1818, which established it in Allegheny County. By an act of the

20th of March, 1821, a similar penitentiary was provided for eastern Pennsylvania, to be located within the county of Philadelphia. In pursuance of these acts of assembly, the two noble structures known as the eastern and western penitentiaries, were erected. By an act of assembly of the 23d of April, 1829, the penal code was revised, crimes defined, and punishments in the two new penitentiaries enjoined. The government of the penitentiaries was committed to boards of inspectors, "consisting of five taxable citizens of Pennsylvania," to be appointed by the judges of the supreme court, and they were to act under "rules and regulations for the better ordering and governing of said penitentiaries," which the act of 1829 set forth in full. Among other details, the discharge of convicts was prescribed. Some immaterial provisions have been supplied by subsequent legislation, but the act of 1829 established a system of punitive justice that has never been essentially modified, and which, by reason of the excellence of the conception and the fidelity of administration, has commanded the attention of the civilized world.

But on the 1st of May, 1861, the legislature passed an act "relative to prison discipline," which, while it does not profess to repeal prior acts respecting penitentiary punishments, nor to disturb the well-matured system which we possess, will, nevertheless, impose new and difficult duties on the inspectors and superintendents of all our prisons, and greatly impair the efficiency of our system, if it do not derange all of its outlines. The inspectors of the eastern penitentiary, with the entire concurrence of their colleagues of the western, have set forth their objections to the act of 1861, in a printed report of a committee of their body. They complain of the act as of doubtful constitutionality, and of such ambiguity that they are unable to carry it satisfactorily into execution. They say they first knew of its passage from the lips of a convict under their care, and that, according to their information, it passed one branch of the legislature at the latest moment of the session, without a word of observation or criticism from a single member.

It is much to be regretted that the legislature of 1861 permitted its powers to be employed in disturbing an admirable system of penitentiary punishment, without consulting any of the officers to whom the system had been intrusted for administration, and whose experience had qualified them for advising wisely in respect to the proposed measure. The act

was, however, passed in all the forms of law, and two prisoners now claim their discharge from further confinement by virtue of its provisions.

The first section requires the wardens or superintendents to keep a record of the name of each prisoner, and of every infraction of the printed and published rules, and of the punishments inflicted therefor, which record is to be laid before the inspectors for examination and approval. The second section provides for a graduated "deduction from the term of sentence" of every prisoner who shall have no infraction of rules recorded against him for any month of the first year of his imprisonment,—one day for the first month, two additional days for the second month, and three additional days for each succeeding month of the first year's imprisonment,—and to a similar deduction of four days for each month of faultless conduct in the second year, and to one additional day per month for each succeeding year.

The third section empowers the inspectors to discharge a criminal whenever he shall have served out his term of sentence, less the number of days to which the act entitles him.

The fourth section provides for a certificate from the inspectors, of the good conduct of the prisoner on his discharge.

We do not think the act unconstitutional on account of its supposed interference with the governor's power of pardon. It leaves the constitutional power of the executive to pardon and relieve unimpaired. A pardon operates directly on the crime, and only indirectly on the criminal. He is discharged from further punishment under the operation of a pardon, because the offense is blotted out for which he was consigned to punishment. The pardon may take effect before the punishment begins, or after it is ended. It is addressed to the crime rather than to the penalty. We cannot see how the governor's prerogative to pardon crime is impaired by the act under consideration.

But a majority of us think the act is unconstitutional as interfering with judgments of the judiciary. The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the legislature. The trial, conviction, and sentencing of criminals, are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can it be reversed or modified by a board of prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed

to legislative modifications? From what judicial sentence may not the legislature direct "deductions" to be made, if this act be constitutional? What they may do indirectly, they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?

It is to be observed that these questions have no reference to the power of the legislature to prescribe a general rule of law that shall be inconsistent with a previous judicial decree. Such a rule, when it operates on future cases and not retrospectively, is quite legitimate. Their power to legislate in that manner is not to be doubted. But under the act in question, the good conduct of a particular individual, under judicial sentence, is to work out for him an abatement of a part of his sentence. In respect to one of the relators, who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment. But is it not equally so in respect to him who was sentenced since the date of the act? The court could not have taken the act into account in measuring the sentence, because they could not know how many days of abatement the prisoner would earn. They could fix his sentence only by the exercise of that judicial discretion which the constitution has vested in the judiciary. Any interference with that sentence, except by a court of superior jurisdiction, or by the executive power of pardon, would seem to be a prostration of that distribution of governmental functions which the constitution makes among three co-ordinate departments. In this view, the act would be highly unconstitutional.

But independently of the constitutional objection, which is not decisive with all of us, we think the inspectors have rendered such reasons for not executing the act in the printed report above referred to as justify them. The legislature evidently meant to leave them a measure of discretion. They are to approve or disapprove of the record made up in favor of each prisoner, and they are to discharge him or cancel his credits as to them seems just and right. The third section confers the power and authority to discharge, but does not expressly enjoin the duty. Doubtless, the duty may be implied from the power, but it is a duty to be exercised under a sound discretion. In the exercise of that discretion, thus left with them, they have declined to discharge the relators, and indeed,

to execute the law. They say it would derange the system of administration long pursued,—that the eldest and most experienced criminals would reap the largest benefits from the act, for it is they who, having been most in prison, are most observant of prison rules, and that public justice would not be promoted by an execution of the law.

We will not overrule their reasons nor control their discretion. The letters from other states in reference to the operation of similar statutes, under different systems of punitive discipline, do not weigh very much with us. Our own experience under our peculiar system is opposed to all such attempts at alleviating prison discipline, and we think it may be safely trusted. The danger of our day is not in the direction of a too rigorous punishment of public criminals, but rather to the letting of the guilty go unwhipped of justice.

The prisoners are remanded into custody.

LOWRIE, C. J., was absent on account of a death in his family.

NORTH PENNSYLVANIA COAL CO. v. SNOWDEN.

[42 PENNSYLVANIA STATE, 488.]

MINING RIGHTS OF TENANT IN COMMON WHEN DENIED BY ALLEGED CO-TENANT, can be established at law only. Equity has no jurisdiction in such a case.

TRIAL BY JURY IN COMMON-LAW CAUSES IS CONSTITUTIONAL RIGHT, and a law that any such causes shall be tried “agreeably to the course of a court of chancery” is obnoxious to this right and void.

BILL in equity by J. R. Snowden against the North Pennsylvania Coal Company. The court below sustained the bill, and the defendants appealed.

Stanley Woodward, for the appellants.

Richard Brodhead and E. L. Dana, for the appellees.

By Court, **STRONG, J.** The bill of the complainant charges that under a deed from Luther Jones, dated April 22, 1799, to William Hooker Smith, his heirs and assigns, and by virtue of sundry mesne conveyances, he has become the owner of certain mining rights and privileges upon a certain tract of land which it describes. These rights and privileges are stated to be “a privilege to dig and search after stone, coal, or any other mineral, without interruption, molestation, denial, or hindrance, and to have free liberty to carry off any mineral,

with teams or otherwise; the said Jones to have an equal right with said Smith, and to have the right of joining in partnership with said Smith." The bill further charges that, by reason of the said grant from Luther Jones, and the conveyances from the executors of the will of William Hooker Smith, the complainant became, was, and is entitled to the full possession, use, and enjoyment of the said rights and privileges, and that the defendants, contrary to equity and good conscience, and to the great wrong and injury of the complainant, have denied and resisted his right and claim to the said mining rights and privileges, and to the coal mines and minerals on the lands, and have also denied and resisted the use, exercise, and existence of said rights, and still deny and resist the same. The bill then proposes interrogatories whether its allegations are not true. The relief prayed for is that the defendants may account for and in respect to all the mining operations conducted on the premises, and that the court may decree that the complainant is entitled to the exclusive use and enjoyment of the said mining rights and privileges, and that they are duly vested in him, and that the defendants may be enjoined against interfering with him in the lawful and proper use of said rights, and from obstructing, or in any wise preventing his exercise thereof, and from denying or resisting his said claim or right, or denying or resisting the use, exercise, or resistance thereof.

Had the court of common pleas jurisdiction of such a bill in equity? It is observable that the bill does not charge that the defendants have succeeded to the rights that remained in Luther Jones, after his deed to William Hooker Smith, or that they claimed any interest in the coals or minerals in the land, or that they had ever been in possession of the land, or received any of its profits. Though it contains a prayer for an account, it lays no foundation for one, and seeks it only as a consequence of the other relief for which it prays. It is true that, by the sixth and seventh interrogatories, the defendants are required to answer whether they have not entered on the land, and usurped the mining rights and privileges, and prevented the complainant from enjoying them; but these acts are not charged, and the stating or charging part of a bill is not helped by the interrogatories: Story's Eq. Pl. 27.

Then, what is the bill more than an attempt to obtain, through the decree of a chancellor, the possession and enjoyment of certain mining rights, from which he claims that he has

been deforced? If those rights amount to a corporeal hereditament; if under his deeds he took an interest in the stone-coal and minerals in the land,—the bill seeks to secure precisely what would be obtained by the common-law action of ejectment. It is then what is sometimes called an ejectment bill, and is demurrable, and would be, even though it had charged that the defendants had got the title deeds, and had mixed boundaries as well as prayed for a discovery, possession, and account: 1 Daniell's Ch. Pr. 610, and cases referred to in the notes. Then the bill charges nothing to give the court equity jurisdiction. It, at most, sets up a case for which there is, and always was, a complete remedy at law. Even the title, stated by the complainant to be in himself, is a strictly legal one, whether it be a corporeal or incorporeal hereditament, or an easement. It may be admitted that a bill will lie by one tenant in common to restrain the commission or waste by his co-tenant, or to procure partition: *Hawley v. Clowes*, 2 Johns. Ch. 122; but even in such cases, confessedly within the jurisdiction of a court of equity, such a court will not interfere, if the complainant's title be denied, until he has vindicated it at law: *Cartwright v. Pultney*, 2 Atk. 280; *Bishop of Ely v. Kenrick*, Bunb. 322; *Coze v. Smith*, 4 Johns. Ch. 271; *Phelps v. Green*, 3 Id. 302. It is true, the court will sometimes retain the bill until the right has been tried at law. But here no tenancy in common is charged, and the bill itself, without awaiting the plea or answer of the defendants, alleges, as the *gravamen* of complaint, that the defendants deny the plaintiffs' title. Nor is this a case of partition. It has never been held that equity courts have jurisdiction of actions, founded on legal title, brought by one tenant in common against an alleged co-tenant to obtain possession or enjoyment of land.

And if the complainant's rights are incorporeal, rather than an interest in the coal or minerals, the case which he presents is not the less a case at law, and without the jurisdiction of a court of equity. His rights are strictly legal, and his remedies are at law. His bill does not even allege that he is without adequate remedy at law. It may be admitted that to prevent the disturbance of an acknowledged easement, a court of equity will interfere. But the right of the plaintiff must be acknowledged or established at law before he can resort to a chancellor. Mr. Justice Woodward in *Rhea v. Forsyth*, 37 Pa. St. 503 [78 Am. Dec. 441], has collected numerous authorities on this subject. Others are at hand, but they are not needed. But

when the complainant himself avers that his right is denied, and when that denial is the very ground of his complaint, it would be a novelty, indeed, for a court of equity to assume jurisdiction. Has it ever been supposed that one claiming a right of way over the land of another can file a bill in equity complaining that the right which he claims is denied, and that enjoyment thereof is refused to him, and praying for an injunction against such denial and refusal of his enjoyment? Has any chancellor ever sustained such a bill, or considered that he had jurisdiction of such a complaint? If he has, then there is no longer any distinction between legal and equitable rights,—then it would be hard to conceive of a case of which chancery has not jurisdiction. That there is, however, and always has been, a class of cases which are exclusively cognisable in courts of law, and over which courts of equity have no jurisdiction, is not to be doubted, and we think the complainant's is one of them. The distinction between what are known as equity cases, and those which are not, has always been recognized in this state, from its earliest existence, as a commonwealth. If the complainant's case, then, is not saved by the act of assembly of April 22, 1856, his bill should have been dismissed, because it presented no case of which the court could assume jurisdiction in equity.

But what is the effect of that act of assembly? It enacted that in addition to the rights granted to persons holding coal or iron-ore mines, or minerals, as tenants in common, by the twenty-fourth section of the act of April 25, 1850 (a section which enabled such tenants in common to go into equity for an account), any person or persons claiming to be tenants in common, joint tenants; or otherwise interested in any coal or iron mines, or other minerals, and which said tenancy claim or right shall be denied or resisted by any other person or persons claiming the same, it shall be lawful for such tenant in common, joint tenant, or other party in interest, to apply by bill or petition in equity to the court of common pleas of the county in which the lands lie, setting forth the right or interest which such claimant has, or claims to have, in said iron ore, coal mine, or other mineral, and that the use, exercise, or existence of said right is denied by the persons claiming the same, whereupon the said court shall proceed to examine, adjudicate, and determine the rights of the several parties in the manner prescribed in the above-recited section (that is, as is expressly enacted according to the course of a court of chan-

cery), and all parties in interest shall be made parties to such proceeding. It is noticeable that this act changes not so much the tribunals in which the controversies of which it speaks may be tried as it does the mode of trial. The controversies must be adjudicated in the manner prescribed in the act of 1850, and that expressly enacts that the court shall proceed "agreeably to the course of a court of chancery." What that course is, is well known. The chancellor adjudicates, not only upon the equities of the case, but he determines the facts out of which the equities arise.

He may, indeed, call in the aid of a jury, but their verdict is not binding upon him as it is upon a court of law; he may disregard it, and decree in opposition to it. Trial, according to the course of a court of chancery, then, is trial by a single judge. But if there is any right to which, more than all others, the people of Pennsylvania have clung with unrelaxing grasp, it is that of trial by jury. They brought it with them from the land of their fathers. In every constitution which has been adopted, they have taken care to secure it against infringement, and put it beyond the power of either the executive, the legislature, or the courts to take it away from any individual. In that of 1776, the eleventh section of the declaration of rights was, "that in controversies respecting properties, and in suits between man and man, the parties have a right to trial by jury," which ought to be held sacred, and the plan or frame of government, while giving to the supreme court and the several courts of common pleas the powers of a court of chancery as to perpetuating testimony, obtaining evidence, and the care of lunatics, and such other powers as future assemblies might give, not inconsistent with that constitution, added immediately, "trial by jury shall be as heretofore." The constitution of 1790, and the amended one of 1838, contain substantially the same provisions, though, if possible, more emphatically stated. Their language is: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." What can this mean but that the right of having controverted questions of fact in common-law cases decided by a jury should be beyond the reach of any department of the government, whether it be the legislature, the executive, or the judiciary? This was the right which had always been enjoyed before, and if the constitutional provisions were not intended to protect that in all its length and breadth, they can mean nothing. It is true, the legislature are authorized to

vest in the courts such powers (beyond those enumerated), to grant relief in equity, as shall be found necessary (art. 5, sec. 6), but this must be understood as referring to powers in equity cases, in that class of cases of which chancery had jurisdiction. Such an understanding is necessary to make the different parts of the constitution consistent with each other, and to give effect to all. It cannot mean that the legislature may confer upon the supreme court and the courts of common pleas the power of trying, according to the course of chancery, any question which has always been triable according to the course of law by a jury. If it can, then an ejectment founded solely on legal title, an action of debt on bond, or a replevin, or an action of trespass, may be sent into chancery, all contested facts in it be decided by the judge, and the intervention of a jury be unknown.

Then what has become of the constitutional right of the citizen? Such a doctrine would startle the people of this commonwealth, and justly, for it would deprive them of one of their most valued privileges. No power in our government can take from the litigant the right to have his case tried by a jury, substantially in the mode and with the same effect as that which belonged to jury trials in similar cases, when the constitution of 1776 was adopted. What is law and what is equity, is a judicial question. It belongs, therefore, exclusively to the judiciary. But were it admitted that the legislature could authoritatively convert a legal right into an equitable one, a court of equity could not, as such, enforce it. The judiciary, no more than the legislature, can deny to any litigant the right of trial by jury in a case appropriate to such a mode of trial.

The act of 1856, then, is applicable only to cases in which the rights of the complainants are equitable. It would conflict with the constitution if it had a more extended application.

The defendants in this case had a right to a trial according to the rules of law. They had a right to have submitted to a jury whether the privileges of the complainant existed upon the lands described in the bill, and whether they had been guilty of denying and resisting those rights, or disturbing the complainant in the enjoyment of the same. Of this mode of trial they could not be deprived, and even the act of 1856 furnishes no sufficient warrant for denying it to them.

It follows that this was not a case of which a court of equity had jurisdiction, and the decree must therefore be reversed.

With such views of the want of jurisdiction in the court, it would be improper to express any opinion respecting the merits of the controversy between the parties.

And now, to wit, May 8, 1862, this cause having been called for argument, and having been argued by counsel on both sides, it is considered, ordered, and adjudged that the decree of the court of common pleas be reversed, and that the bill of the complainant be dismissed, with costs.

CONSTITUTIONAL RIGHT OF TRIAL BY JURY: See *Lee v. Tillotson*, 35 Am. Dec. 624, and collected cases in note to same 626; extended note to *Nixon v. State*, 41 Id. 604; extended note to *Flint River Steamboat Co. v. Roberts*, 48 Id. 185-194; *Inhabitants of Saco v. Wentworth*, 58 Id. 786, and note 791-792. Cognizance of a case at law cannot be given to a court of equity so as to thereby deprive the party of his right to trial by jury: See note to *Flint River Steamboat Co. v. Roberts*, 48 Id. 188, citing the principal case.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A court of equity has no jurisdiction of a bill brought by one tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges, founded on legal title, until those rights have been established at law: *Friesbe's Appeal*, 88 Pa. St. 147. An act giving a tenant in common in coal or iron mines, whose right is denied or resisted, the power to apply by petition in equity to the court of common pleas of the county where the lands lie, and investing such court with the jurisdiction to adjudicate and determine the rights of the several parties according to the course of a court of chancery, conflicts with the constitutional right of the citizen to have controverted questions of fact in common-law causes decided by a jury, and applies only to cases in which the rights of the complainants are equitable: *Norris's Appeal*, 64 Id. 280. For case showing circumstances where the court of common pleas had jurisdiction of the bill, and which did not fall within the decision of the principal case, see *Kisor's Appeal*, 62 Id. 435. As to where the claim was of an adverse legal right determinable at law, and not in equity, see *Barclay's Appeal*, 93 Id. 54. The interference of a court of equity rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon just and equitable grounds ought to be prevented. Even in cases confessedly within the jurisdiction, as partition, equity will not interfere if the complainant's title be denied, until he has vindicated it at law; the court may retain the bill, however, until that has been done: *Washburn's Appeal*, 105 Id. 483. Equity will discourage the filing of bills in cases where the jurisdiction is doubtful; because orders and decrees in equity, where there is no jurisdiction, are simply *coram non judice*: *Grubb's Appeal*, 90 Id. 235; *Phillips's Appeal*, 68 Id. 137. For an example of a demurrable ejectment bill which should be dismissed, see *Long's Appeal*, 92 Id. 179.

HEIL v. GLANDING.

[42 PENNSYLVANIA STATE, 428.]

IN CASES OF MUTUAL, CONCURRING NEGLIGENCE, neither party can maintain an action against the other.

UNAUTHORIZED USE OF RAILROAD OF ANOTHER IS NEGLIGENCE.

INJURY FROM COLLISION BETWEEN TWO INTRUDERS ON RAILROAD creates no right of action in either against the other.

THERE IS NO ROOM FOR VINDICTIVE DAMAGES, where the injury was not willful.

DETERMINATION OF DAMAGES IN ACTION OF TORT SHOULD NOT BE LEFT ABSOLUTELY TO JURY. Actual compensation is all the injured party can claim, if the injury was not willful.

TRESPASS. The plaintiff, Glanding, was driving his horse with a loaded truck-car on the Swatara Railroad, when he was overtaken by a train loaded with coal, running by gravity, and in charge of defendant, Heil. In trying to save his horse, plaintiff's foot was caught and crushed by the passing train, and his horse was killed. There was evidence that both parties were unlawfully on the road. Plaintiff brought this action for damages, and under the instructions of the judge, the jury found for the plaintiff, in the sum of \$1,545. The character of the instructions objected to sufficiently appear in the opinion.

John Bannon, for the plaintiff in error.

F. Ward, J. Hughes, and Charles D. Hipple, for the defendant in error.

By Court, **STRONG, J.** By the unqualified affirmance of the first and second points of the plaintiff below, the jury were in effect instructed that there might be a recovery, even though the plaintiff was wrongfully on the railroad when the collision took place. He had sustained damage in consequence of what he alleged to have been an unauthorized and negligent use of the railroad of the Swatara Railroad Company by the defendant; and he had sustained the damage while he himself was upon the same railroad, as the evidence tended to prove, without right. The collision which caused his personal hurt and the destruction of his property was the combined result of the use of the road by himself and the defendant, and the case was not one of wanton or intentional injury. The injury to the plaintiff was caused by the negligence, the carelessness, or unskillfulness of the defendant or the plaintiff, or of both. In such a case, was it right to charge the jury that if the defendant was

unlawfully upon the road, and in consequence of his neglect and unskillful management of a train of cars which he had improperly taken in charge, the plaintiff was hurt, there could be a recovery, without any reference to the question whether the plaintiff was also unlawfully and negligently there?

The general principle is, that one who seeks to recover damages for an injury caused concurrently by his own negligence, and by the negligent or unskillful act of another, must fail. Where there has been mutual default, neither party can recover damages from the other. For this, the authorities are abundant. And it is equally certain that the unauthorized use of a railroad is negligence. We held it such in *Railroad v. Norton*, 24 Pa. St. 485. It was so held in *Brooks v. Buffalo & N. F. R. R. Co.*, 25 Barb. 600, and such rulings are necessary for the protection of the public. The safety of passengers, as well as of property, demands it. The carrier of both, as well as the passenger and the freighter, must be secured against the use of railroads for any other than legitimate purposes, and against the intrusion of all other persons than those whose right to be upon the roads renders their being there not unexpected. The unauthorized invader of a railroad has no reason to complain that persons passing upon it did not anticipate his presence, where he had no right to be. If, therefore, the plaintiff Glanding was upon the railroad without authority, his being there was negligence; and it was negligence which directly and proximately concurred with the negligence of the defendant, in producing the disaster which befell the plaintiff and his property.

It is insisted, however, that though his unauthorized, and therefore negligent, use of the railroad might stand in the way of his bringing any suit against the railroad company, for any default of theirs, it was no wrong done to Heil, the defendant. It is said Heil, having himself been unlawfully upon the road, had no right to call in question Glanding's right to be there. This argument cuts both ways. Admitting that both parties were intruders on the road, and that both failed in duty to the company, how can Glanding complain of Heil's unauthorized use of the road any more than Heil can complain of Glanding's? If it be said that Glanding could not have anticipated an unlawful use of the road by Heil, it may, with equal truth, be said that Heil might have presumed that Glanding would not be there without right. And why is not the right of Heil to sue Glanding for the destruction of his coal-cars just as

complete as is the title of the latter to maintain this suit? Neither can say to the other, your negligence was more a failure of duty to me than mine was a failure of duty to you.

But the principle of the argument is unsound. The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is, not that the wrong of the one is set off against the wrong of the other; it is that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct. It is obvious, then, that it can make no difference against whom his fault was primarily committed. If he has suffered in consequence of his own fault, the law gives him no remedy.

Instead, then, of affirming the first and second points of the plaintiff, the court should have qualified their answer by instructing the jury that if he was using the railroad, by running a horse-car upon it, without lawful authority, the act was negligence, concurrent with that of the defendant, and that there could be no recovery.

This view of the fifth and sixth assignments of error renders it unnecessary to discuss at length the answer to the points propounded by the defendant. We see no error in them if Glanding was by right running his horse-car on the road. If he was not, they are immaterial.

Nor do we discover error in the admission and rejection of evidence.

As the case is to go back to another trial, we think it proper to say that, when the court undertook to charge upon the measure of damages recoverable, if any, more precise instruction should have been given. It is true, as the learned judge said, there is no certain rule by which to estimate the damages for an injury to the person, but there are guides. In an action on a contract, this court has held that a reference of the jury to the facts and circumstances of the case would answer. The contract itself, which was in evidence, was a measure. Not so in an action for a tort. Compensation was all that the plaintiff could, under any circumstances of this case, claim. The injury not having been willful, there was no room for vindictive damages. There was, however, no prayer for instruction on this point, and we would not reverse the judgment were there no other misdirection than in what was said respecting the measure to be adopted by the jury.

But for the answers made to the plaintiff's first and second points, there must be a new trial.

Judgment reversed, and a *venire de novo* awarded.

READ, J., dissented.

WHERE NEGLIGENCE IS MUTUAL, NEITHER PARTY CAN RECOVER for injury resulting therefrom: *Reeves v. Delaware etc. R. R. Co.*, 72 Am. Dec. 712, and collected cases in note to same 720; note to *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 728; *Chicago etc. R. R. Co. v. Dewey*, Id. 374, and collected cases in note 376; note to *Milwaukee etc. R. R. Co. v. Hunter*, 78 Id. 706; *Chapman v. New Haven R. R. Co.*, 75 Id. 344, and note 346; note to *Peoria Bridge Ass'n v. Loomis*, 71 Id. 286; *Chicago etc. v. Patchin*, 61 Id. 65. As applicable to cases of collision, see *Adams v. Wiggins Ferry Co.*, 72 Id. 247. But the principle of concurrent negligence must be carefully applied, as it arises from a particular state of facts: *Pennsylvania R. R. Co. v. Kilgore*, Id. 787.

WHERE PARTIES HAVE RECIPROCALLY VIOLATED LAW, neither is entitled to damages: *Barrow v. Landry*, 77 Am. Dec. 199.

UNAUTHORIZED USE OF RAILROAD TRACK IS NEGLIGENCE: See note to *Little Schuylkill etc. Co. v. Norton*, 64 Am. Dec. 675, citing the principal case.

EXEMPLARY OR VINDICTIVE DAMAGES, WHAT ARE, AND WHEN ALLOWED: *Smithwick v. Ward*, 75 Am. Dec. 453; *Hagan v. Providence etc. R. R. Co.*, 62 Id. 377, and note 379; *Black v. Carrollton R. R. Co.*, 63 Id. 586. They may be given in cases of willful negligence or malice: *Peoria Bridge Ass'n v. Loomis*, 71 Id. 283; *Windham v. Rhame*, 73 Id. 116.

IN AWARDED VINDICTIVE DAMAGES, JUDGMENT OF JURY GOVERNS, and not opinion of the court: *McCoy v. Lemon*, 70 Am. Dec. 248.

THE PRINCIPAL CASE WAS CITED IN *Burkholder v. Stahl*, 58 Pa. St. 376, to the point that a judge's failure to instruct in matters upon which he was not requested to instruct is not error which may be assigned.

TRAVIS v. BROWN.

[48 PENNSYLVANIA STATE, 9.]

EVIDENCE OF GENUINENESS OF PAPER IN SUIT MAY BE CORROBORATED BY COMPARISON, to be made by the jury, between that paper and other well-authenticated writings of the same party.

WITNESSES HAVING KNOWLEDGE OF PARTY'S HANDWRITING ARE COMPETENT TO TESTIFY AS TO ITS GENUINENESS, but not to make a comparison of hands, for that is the province of the jury.

TEST DOCUMENTS, to BE USED IN COMPARISON OF HANDWRITING, SHOULD BE ESTABLISHED BY MOST SATISFACTORY EVIDENCE before being admitted to the jury.

EXPERTS MAY BE EXAMINED TO PROVE FORGED OR SIMULATED WRITINGS, and to give conclusions of skill, but not to make comparisons with other authenticated papers, and express opinions from the comparisons.

EVIDENCE IN REBUTTAL IS ADMISSIBLE, ON DEFENDANT'S PART, to the effect that on a former hearing of the case, a witness for the plaintiff, to prove the genuineness of a paper, testified that she saw the defendant sign it,

where the witness on the present hearing testifies in what room he signed it, and that "he stood by the secretary, and stooped over to sign it," without expressly stating that he was seen to sign it, because if there is an essential contradiction the defendant is entitled to the benefit of it, and if there is none, the plaintiff is not injured.

DEPOSITIONS SHOULD NOT BE PERMITTED TO BE READ IN EVIDENCE, where no rule was entered for taking them, as required by the rules of court.

FEIGNED issue, to try the validity of a judgment in favor of William Travis, against Oramal Brown and A. N. Lancaster. Lancaster had applied to Travis for a loan, and upon Travis's wishing security, offered a note signed by himself and Brown. The note was afterwards renewed by the note in question. Judgment was entered thereon, and a *fiery facias* issued. Brown thereupon made an affidavit that he never signed the last note, and the judgment was opened, and he was allowed to put in a defense. The defendant offered to prove by C. L. Ward and others that the signature of Brown to the note in question was written by the same hand that wrote the body of the note and the signature of Lancaster, and that Brown's signature to the note was, in the opinion of the witness, in a feigned and simulated hand. He also offered to prove by one Lathrop, who had never seen Brown write, that Brown's signature to the note was not written by the same person who wrote the same name to two test papers already in evidence. The plaintiff objected to all this evidence, but the court overruled the objection. The defendant offered to read in evidence the depositions of two persons, Brown and Dix, to which the plaintiff objected, because no rule had been entered for taking them, other than a rule on five days' notice to show cause why the judgment should not be opened; but the objection was overruled. The plaintiff, to show that Brown signed the note, read in evidence the deposition of Mrs. Lucy Lancaster, who described in what room he signed it, and that "he stood by the secretary, and stooped over to sign it." The defendant, to rebut this evidence, offered to prove by the witnesses who heard the testimony of Mrs. Lancaster on the former hearing, before Judge Read, that she did not testify that she saw the defendant sign the note, but that she then testified that she did not see him sign it. The defendant objected to this evidence, but the court admitted it. There was a verdict and judgment for the defendant, and the plaintiff thereupon sued out a writ of error.

Bentley and Fitch, for the plaintiff in error.

R. B. Little, for the defendants.

assistance to the jury; and of course, also, very much must at last be left to the discretion of the court relative to the need of such assistance in the case; for very often the matter investigated may be so bunglingly done that the most common degree of observation may be sufficient to judge it.

Where a witness is called to testify to handwriting, from knowledge of his own, however derived, as to the hand of the party, he is not an expert, but simply a witness to a fact in the only manner in which that fact is capable of proof. Nor is he an expert who is called to compare a test writing, whose genuineness is established by others, with the writing under investigation, if he have knowledge of the handwriting of the party, because his judgment of the comparison will be influenced more or less by his knowledge, and will not be what the testimony of an expert should be,—a pure conclusion of skill.

But when a witness, skilled in general chirography, but possessing no knowledge of the handwriting under investigation, is called to compare that writing with other genuine writings that have been brought into juxtaposition with it, he is strictly an expert. His conclusions then rest in no degree on particular knowledge of his own, but are the deductions of a trained and experienced judgment, from premises furnished by the testimony of other witnesses.

According to many authorities, these forms of proof are admissible in appropriate circumstances, in cases both civil and criminal; but when evidence by comparison of hands should be received, whether the witness making the comparison should be qualified by personal knowledge of the party's handwriting, when mere experts should be admitted to make the comparison, and what degree of evidence is required to establish the genuineness of test papers, are questions that have been debated in a multitude of cases, from the attainder of Algernon Sydney and its reversal, in the reign of Charles II., and the case of *The Seven Bishops*, in the time of James II.: See 3 How. St. Tr. 802, and 4 Id. 338. The English and American authorities will be found collected in the notes to Starkie and Greenleaf, and whoever will undertake to go through them will be struck with the confusion, obscurity, and contradiction which have arisen almost entirely from disregard of the distinctions above stated. Questions have been discussed as belonging to the law of experts, and of comparison of hands, which belonged to other heads, and judges and compilers have often written loosely, even when these subjects

were legitimately before them. Every one knows how essential it is to all scientific discussions that terms be first correctly defined, and then always used in the defined sense. If this rule had been reasonably observed in treating of the branch of the law we are now upon, we should not have had so many inconsistent cases in the books, and it would not have been, as it is now, exceedingly difficult for judges and lawyers to know what the mind of the law is touching proof of writings by comparison of papers. Without detaining ourselves to make a minute analysis of the cases in England and our sister states, I propose to examine our leading cases in Pennsylvania, and to state, as clearly as I can, the rule which is fairly deducible from them.

McCorkle v. Binns, 5 Binn. 348 [6 Am. Dec. 420], involved a comparison of printed papers. The law of written papers came in only incidentally by way of illustration, and Chief Justice Tilghman simply stated the rule, in the most general terms, that "after evidence had been given in support of a writing, it may be corroborated by comparing the writing in question with other writings, concerning which there is no doubt." By whom compared, whether by the jury or a witness, and if by a witness, what qualifications he must have, were points which the chief justice did not touch.

In the *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110, Whitehill was sued as indorsee of a promissory note, and the genuineness of his signature was the point in question. Matthiot and McClure both swore to their belief that the indorsement was in Whitehill's handwriting. They had both seen him write, and Matthiot had Whitehill's signature to a receipt in his possession. Of course, they were both qualified to prove the indorsement, according to the ordinary rule of evidence. But to corroborate their opinions, an original administration account was offered in evidence, which Whitehill and his mother had settled, signed, and sworn to, in the presence of the register who proved it. This account, the genuineness of which was thus indubitably established, was the test paper that was brought into juxtaposition with the indorsed note; and it was offered in evidence by the plaintiff to the jury "that they might compare the signature of the defendant thereto with the handwriting of the note." The judge of the common pleas rejected the evidence, but this court ruled that it ought to have been admitted. The doctrine which this case established, therefore, was that, in corroboration of antecedent

testimony of a signature, a test paper, clearly proved, might be submitted to the jury to make comparison of the two papers. This was evidence by comparison of hands, but it was comparison by the jury instead of a witness.

In *Lodge v. Phipper*, 11 Serg. & R. 334, the effort was to prove that a receipt of Reuben Haines had been forged by one William Shaw, and for this purpose several papers were produced, and fully identified as Shaw's writing. Instead of submitting them to the jury to compare with the receipt, Israel Pleasants was called as an expert to make the comparison, and to give his opinion of the signature of the receipt. He had never seen Shaw write, but he had been a man of business for many years, had had extensive correspondence, and was accustomed to see a great deal of writing. The court admitted him to testify, but this court reversed the ruling in an emphatic opinion by Chief Justice Tilghman.

This case is entirely consistent with *Farmers' Bank v. White-Mill*, 10 Serg. & R. 110, and the two taken together establish the rule that comparison of hands may be made by the jury, but not by a mere expert.

Pennsylvania Bank v. Jacobs, 1 Penr. & W. 178: the genuineness of a certain check, purporting to have been drawn by Samuel Jacobs in his lifetime, was in question in this case. After several genuine checks had been given in evidence on the part of the defendant, three witnesses were called who had seen Jacobs write frequently, and had for a long time done business and carried on correspondence with him, and they were permitted to compare the genuine checks with the doubtful one, and to give their opinion that it was a forgery. Then, on the part of the bank, three cashiers of other banks were called to testify as experts. They had all the experience in judging of writings which cashiers of banks usually acquire, but they had never seen Jacobs write. Their testimony was admitted also. This court, in a very satisfactory opinion by the late Judge Smith, decided that the three witnesses on part of the defendant were rightly admitted, but that the testimony of the three cashiers on the part of the plaintiff ought to have been excluded.

It is manifest that, according to general rules, the three witnesses were competent to speak of the signature of the check, because they had seen Jacobs write. They had exemplars in their minds, and comparing the check with these, they had a right to speak. The point of the ruling was, that

they might also compare the check with the accredited tests that were in evidence; but the learned judge fell into error when he cited *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110, as an authority on this point, because, as we have seen, that case ruled that the jury, not witnesses, were to make the comparison. He more accurately quoted *Lodge v. Phipper*, 11 Id. 334, as an authority against admitting the experts. I do not think the court meant to advance a step in this case beyond the doctrine of the prior cases. The testimony of the defendant's witnesses was admissible, without reference to the peculiar doctrine of comparison of hands, and I hold that the comparison which the case of *Farmers' Bank v. Whitehill*, 10 Id. 110, had decided was to be made by the jury, was as much the rule after Jacobs's case as before it.

Callan v. Gaylord, 3 Watts, 323, is not a very intelligible case. Though a civil action for libel, the opinion of Gibson, C. J., is a good deal occupied with an argument to prove that the rule of evidence in regard to comparison of hands is the same in criminal and civil cases. The account-books which were produced as the tests were proved by witnesses who were acquainted with the defendant's writing, and we understand the chief justice to have ruled that they were admissible for the jury to make comparison of them with the alleged libel. This was consistent with *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110, which he cited, and doubtless meant to follow.

Baker v. Haines, 6 Whart. 291 [36 Am. Dec. 224], states the general principle of the admissibility of comparison of hands, without intimating whether the comparison is to be made by witnesses or the jury, and then rules that very strict proof should be given of the genuine or test paper,—such as would leave no reasonable doubt on that point. And the proof of the test papers in that case was held insufficient, though it was by witnesses who had seen the party write. This is a very important case in regard to what is sufficient to establish a test; but who is to apply the test when established, whether jury or witness, is not decided in the case. So with *Depue v. Place*, 7 Pa. St. 429, the question related to the sufficiency of the authentication of the test papers rather than to the application of them.

In *Power v. Frick*, 2 Grant Cas. 307, there was no test paper in question. The ruling related entirely to the knowledge of a party's handwriting which a witness must possess to enable him to prove a lost note.

So in *Fulton v. Hood*, 34 Pa. St. 365 [75 Am. Dec. 664], there was no test writing, and therefore, strictly speaking, no comparison of hands. The question was upon the alteration of the date of the bond in suit. McKinney, the subscribing witness, was the scrivener who prepared the bond, and he swore that the alteration in the date, and the addition of the concluding words, were made before the bond was executed. After the defendant had given evidence to contradict him, the plaintiff was permitted to prove by experts, in corroboration of the subscribing witness, that the whole bond, including the additional date, appeared to be written by the same hand, with the same pen and ink, and at the same time. We sustained this ruling. There are not wanting cases in the books to show that experts may be called to testify whether a particular handwriting is natural and genuine or forged and imitated: See Sharswood's *Stark. Ev.*, p. 152, in notes. And such cases sustain our ruling in *Fulton v. Hood*, 34 Pa. St. 365 [75 Am. Dec. 664], but it is only necessary to recur to the distinctions which I stated at the outset of this opinion, to see that that case bears no relation to the cases on evidence by comparison of hands.

Taking *Farmers' Bank v. Whitehill*, 10 Serg. & R. 110, *Lodge v. Phipper*, 11 Id. 334, and *Baker v. Haines*, 6 Whart. 291 [36 Am. Dec. 224], as the leading cases in Pennsylvania on this branch of law, the following summary may be stated as fairly resulting from them:—

1. That evidence touching the genuineness of a paper in suit may be corroborated by a comparison, to be made by the jury, between that paper and other well-authenticated writings of the same party.

2. But mere experts are not admissible to make the comparison, and to testify to their conclusions from it.

3. That witnesses having knowledge of the party's handwriting are competent to testify as to the paper in suit; but they, no more than experts, are to make comparison of hands, for that were to withdraw from the jury a duty which belongs appropriately to them.

4. That test documents to be compared should be established by the most satisfactory evidence before being admitted to the jury.

5. That experts may be examined to prove forged or simulated writings, and to give the conclusions of skill in such cases as have been mentioned, and their like.

Our cases are all reconcilable with these conclusions, though the language of judges has not always been as guarded as would have been well. No doubt, inconsistent authorities may be found outside our borders, but it is not worth our while to discuss them, for if we have got a settled rule of our own, it is enough for us to adhere to it.

It is not difficult to make application of these principles to the case before us. The witnesses who had seen Brown write were quite competent to give their opinions of the genuineness of the signature in question, comparing it with their recollection of his handwriting, and they were competent also to prove the test papers, but they should not have been permitted to make comparison of the note in suit with the test papers. That was for the jury. If the court were satisfied that C. L. Ward was an expert, having no competent knowledge of Brown's particular handwriting to speak from, he was competent to express an opinion whether the signature was feigned and imitated or natural and genuine. If he had knowledge of Brown's hand, he was to speak like other witnesses, from the exemplar in his memory.

Lathrop was improperly admitted. He had not seen Brown write, and he was called to establish no test writing. He was a mere expert, and as such was not, under our rule, competent to compare writings. If the observations which fell from Judge Strong, in *Fulton v. Hood*, 34 Pa. St. 365 [75 Am. Dec. 664], seem to favor the admission of the testimony of these witnesses, it must be remembered that judicial language is always to be received with the limitations that are implied from the facts of the case. That case was well enough ruled upon its peculiar circumstances, but we did not mean to be understood as overruling *Lodge v. Phipper*, 11 Serg. & R. 834.

Of the defendant's rebutting evidence to contradict Mrs. Lancaster, the plaintiff has no reason to complain. The witnesses did not hear her say before Judge Read that she saw Brown sign the note, nor does she say it *in totidem verbis*, in her deposition. She describes in what room he signed it,—“he stood by the secretary, and stooped over to sign it,”—which is coming very near to saying that she saw it signed. Still she does not expressly aver that she saw him sign. If there was an essential contradiction in her two testimonies, the defendant was entitled to the benefit of it; if there was none, the plaintiff was not injured.

We probably would not think it worth while to reverse the

case on account of the mistake of practice in taking the depositions of Brown and Dix without a rule duly entered for that purpose, but as the case is to go back for other reasons, we may say that a rule ought to have been entered as provided for in the fortieth rule of court. The case of *Haupt v. Henninger*, 37 Pa. St. 140, was misunderstood. The depositions there were taken in pursuance of a rule entered for the purpose,—entered, indeed, before the rule to show cause was obtained,—but entered, nevertheless, in a pending cause, and the adverse party appeared and cross-examined. Under these circumstances, we held the depositions admissible on the trial of an issue to try the validity of the judgment, the witness being dead at time of trial.

But here, though there was a pending cause, there was no rule entered therein to take depositions, as the rule of court required.

We think, under the circumstances, the depositions were not well taken.

The judgment is reversed, and a *venire facias de novo* is awarded.

EVIDENCE OF GENUINENESS OF SIGNATURE FOUNDED ON MERE COMPARISON OF HANDWRITING IS GENERALLY INADMISSIBLE: *Clark v. Wyatt*, 77 Am. Dec. 90, and note; and see note to *Hammond v. Woodman*, 66 Id. 240.

EVIDENCE OF GENUINENESS OF PAPER MAY BE CORROBORATED BY COMPARISON: *Clark v. Wyatt*, 77 Am. Dec. 90, and note; and see note to *Hammond v. Woodman*, 66 Id. 240. Comparison can be made only by the jury, and is not allowed as independent proof; it can be used only as corroborative, after evidence has been adduced in support of a writing: *Haycock v. Group*, 57 Pa. St. 441, citing the principal case.

WITNESS HAVING KNOWLEDGE OF HANDWRITING MAY TESTIFY AS TO ITS GENUINENESS: *Clark v. Wyatt*, 77 Am. Dec. 90, and note; compare *State v. Brown*, 70 Id. 168.

EXPERTS MAY TESTIFY AS TO GENUINENESS OF SIGNATURE: Note to *Hammond v. Woodman*, 66 Am. Dec. 240; *Marcy v. Barnes*, 77 Id. 405; and see *Fulton v. Hood*, 75 Id. 684. After evidence has been given as to the handwriting, the testimony of experts is admissible in corroboration: *Burkholder's Ex'r v. Plank*, 69 Pa. St. 225, citing the principal case.

HESS'S APPEAL.

[48 PENNSYLVANIA STATE, 72.]

WILL IS VALID THOUGH NOT READ TO OR BY TESTATOR, where it is written in his presence and according to his dictation, and executed in accordance with the statutes.

APPEAL from a decree of the register's court, confirming the decision of the register, admitting to probate a paper purporting to be the last will and testament of Michael Hess. The facts are stated in the opinion.

Josiah Funck and Levi Kline, for the appellants.

Jacob Weidle, for the appellees.

By Court, LOWRIE, C. J. This will is in writing, and signed by the testator at the end thereof, and proved by two witnesses, and therefore it has all the statutory requisites of validity. But the scrivener, who was not one of the subscribing witnesses, testified that he did not read over the will to the testator after he had written it, and that he wrote it according to the dictation of the testator and in his presence. The defect alleged is, therefore, that one of the usual forms, not enjoined by the statute,—the reading of the will,—was omitted. Does this render the execution nugatory? The opinion of the learned judge below fully proves that it does not. We should have to add a new provision to the statute to affirm that it does. It is only because wills are less common in fact and in substance than other writings that we are more exacting in relation to the formality of reading before signing. But when the very witness who proves the omission proves also the authenticity of the writing, as the very will of the testator, ascertained and written from his own dictation freely made, then what have we to doubt about? When the testator trusts his scrivener, why should we distrust him, when there is no word or act that impeaches his honesty? The decision below was, that where a will, written in the presence of the testator, and according to his dictation, is executed in accordance with the statutes, it is valid, though not read to or by him; and the cases cited by the learned judge show that the decision is right.

Appeal dismissed at the cost of the appellants.

WILL IS VALID, THOUGH NOT READ TO OR BY TESTATOR: *Humphill v. Humphill*, 21 Am. Dec. 331; *Olifton v. Murray*, 50 Id. 411.

SHALTER AND EBLING'S APPEAL.

[48 PENNSYLVANIA STATE, 82.]

ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO AND HIS SURETIES ARE LIABLE ON THEIR BOND to the parties interested in the estate, although the administrator be improperly appointed.

ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO AND HIS SURETIES ARE LIABLE ON THEIR BOND for the proceeds of real estate sold by the administrator, as directed by the will, for which he failed to account, although the bond is in the form of an original administration bond in cases of intestacy.

SALE OF REAL ESTATE BY ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO, AFTER EXPIRATION OF YEAR, IS AS EFFECTUAL as if made by the executors, who had the power to sell, under a will which directed a sale by the executors "so that it be within one year" after the death of the testator. The provision is only directory, and not a condition precedent.

APPEAL by Francis B. Shalter and Jacob S. Ebling, sureties on the administration bond of George Fox, administrator *de bonis non cum testamento annexo* of John Miller, from a decree of the orphans' court, directing Fox to pay the accrued interest on \$1,433.69, amounting to \$446.16, to Susanna Maurer. Miller's will, which was proved November 21, 1836, appointed John, Elijah, and Sebastian Miller, his executors, and among other dispositions, provided that his wife should have for her life one third of the rents, issues, and profits of certain lands, which were not to be sold; that these lands should be appraised after the testator's youngest son had attained majority, and from them the wife was to receive one third of the valuation money; that an equal division of the whole estate was to be made among the testator's children and their representatives, except that his son William's children were to receive only one half as much as the testator's other children; that the share coming to the testator's son Benjamin was to remain in the lands as valued, and he was to receive the yearly interest therefrom during his lifetime, with certain dispositions of the principal over; and a similar provision was made with reference to the share of the testator's daughter Susanna, wife of John Maurer. The testator then directed that all the rest of his real estate should be sold at public sale by his executors "as soon after my decease as may be, according to their best discretion, so that it be done within one year after my decease." On November 8, 1838, Sebastian Miller filed his account, which was afterwards confirmed, and he was discharged April 5, 1839; and on November 9, 1839, Elijah Miller filed his ac-

count. John Miller never rendered any account. It did not appear that John or Elijah Miller were ever discharged by the court; although on November 9, 1839, the register made the following entry in his minutes: "John Miller, Elijah Miller, and Sebastian Miller have renounced." On the same day, letters of administration with the will annexed were granted by the register to George Fox, who, with the appellants, Shalter and Ebling, entered into a bond in the common form of an original administration bond in case of intestacy. Partition and valuation were made of the real estate directed to be appraised, and six tracts thereof not having been accepted at the valuation, the court granted Fox an order to sell the tracts, which he did on November 30, 1839, subject to the widow's third, and the shares of Benjamin Miller and Susanna Maurer, in the purchase-money. Certain other real estate was sold by Fox in 1840, without any order of court. Fox's accounts, filed and confirmed by the court, showed a balance in his hands, received from the personalty of the estate. In May, 1856, Susanna Maurer presented a petition to the orphans' court for a citation, which was awarded and served on the appellants. The petitioner claimed that under a report of the auditor upon the account of Fox, she was entitled to the annual interest on \$1,433.69, for life, under her father's will, of which a portion only had been paid, and praying an order for the payment of the balance. The appellants answered this petition. In February, 1857, Mrs. Maurer presented another petition praying an order on Fox for the payment of the balance, and asking for a citation to Fox, and the purchasers and owners of the land sold by Fox. A citation was awarded and served upon the purchasers and the appellants. The court ordered that the answers put in by the appellants to the first citation should be taken as an answer to this also.

Charles Davis and Jacob S. Livingood, for the appellants.

John Banks, for the appellee.

By Court, READ, J. It is difficult to follow the order of the specifications of error in this case; because some of the questions which have been argued under the first and fourth assignments are not specifically stated in them, and the second and third assignments under the decree appealed from are not necessarily involved in this decision, unless we should think the decree was erroneous *per se*.

The first objection, that the administrator *de bonis non cum*

testamento anexo was improperly appointed, is met by the case of *Foster v. Commonwealth*, 85 Pa. St. 148.

The second objection, that the administration bond was not in proper form, and did not cover the proceeds of the sale by the administrator of the real estate of the testator, is disposed of by the case of *Hartzell v. Commonwealth*, 42 Pa. St. 453, decided at Philadelphia, on the 21st of April last.

The sale of the real estate by the administrator, George Fox, was as effectual as if it had been made by the executors, who undoubtedly had the power to sell, although the year had expired, for that was only directory, and not a condition precedent, and the proceeds having been received by the administrator, the court were right in making the decree of the 6th of January, 1859, from which this appeal was taken. The *ieri facias* of course was right.

Decree affirmed, at the costs of the appellants.

APPOINTMENT OF ADMINISTRATOR DE BONIS NON, WHEN PROPER: See note to *Potts v. Smith*, 24 Am. Dec. 379.

CHARACTER OF BOND TO BE EXECUTED BY ADMINISTRATOR DE BONIS NON: See note to *Potts v. Smith*, 24 Am. Dec. 383.

SURETIES' LIABILITY ON ADMINISTRATION BONDS: See note to *Commonwealth v. Stub*, 51 Am. Dec. 519.

DEFECTIVE ADMINISTRATION BOND, EFFECT OF, ON ADMINISTRATION: See *Peebles v. Watt's Adm'r*, 33 Am. Dec. 531; *Bloom v. Burdick*, 37 Id. 290; *Palmer v. Oakley*, 47 Id. 41.

BRAWN v. KELLER.

[48 PENNSYLVANIA STATE, 104.]

VOLUNTARY SALE OF PERSONAL PROPERTY IS FRAUDULENT AND VOID, AS AGAINST VENDOR'S CREDITORS, unless accompanied by an actual delivery of possession to the vendee.

CONCURRENT POSSESSION BY VENDOR AND VENDER IS INSUFFICIENT to protect the property from the creditors of the vendor.

SALE IS FRAUDULENT AND VOID AS TO VENDOR'S CREDITORS, where the parties to the sale were brothers-in-law, living in the same house, and the horse and carriage sold were kept in a stable on the lot where the parties lived, and were used by the vendor after the sale as before.

REPLEVIN by Reuben S. Brawn against Peter W. Keller, for a mare and a carriage. One Hawkins, a brother-in-law of the plaintiff, Brawn, sold the property in controversy to Brawn, and was credited with the price on a note of Hawkins held by Brawn. The parties lived in the same house. The horse and

carriage were kept in a stable on the lot where the parties lived, and after the sale, Hawkins used them as he had done before, attended to them, bought hay for the horse, and with Brawn's permission, offered the property for sale. In this condition, creditors of Hawkins levied upon the property, and it was sold to the defendant, Keller. The court instructed the jury that, as the plaintiff had failed to show such a change of possession accompanying the sale as was required to make a sale valid as against creditors, they should find for the defendant.

Mayer and Ball, for the plaintiff in error.

John H. Orvis and H. N. McAllister, for the defendant in error.

By Court, STRONG, J. In this state, ever since the case of *Clow v. Woods*, 5 Serg. & R. 275 [9 Am. Dec. 346], it has been held that a voluntary sale of personal property, unaccompanied by an actual delivery of the possession to the vendee, is fraudulent and void as against creditors. This was the doctrine of *Edwards v. Harben*, 2 Term Rep. 587, and it is too well founded in reason ever to be shaken. The delivery which the law requires must be actual. A symbolical or a merely formal delivery will not answer: *Babb v. Celmson*, 10 Serg. & R. 419 [18 Am. Dec. 684]. Concurrent possession by the vendor and vendee is insufficient to protect the property from the creditors of the vendors. Retention of the possession not only tends to give false credit to the seller, but it is a sign of a secret trust in his favor. Such being the law, the plaintiff in this record had no case. It would have been error to submit to the jury to find whether there had not been a delivery of the property alleged to have been bought by him, for there was no evidence of any such change of the possession as is indispensable. The parties to the sale were brothers-in-law, living in the same house. Before the sale, the horses and carriages were kept in a stable on the lot where both parties lived, and they remained there until levied upon by the creditors of Hawkins. After the sale, they were used by Hawkins as before, and attended to by him. He bought hay for the horses, and offered to sell them, with the permission of the vendee, and continued to exercise over them every conceivable act of ownership. His own testimony is, that it was part of the arrangement that he should take care of the horses, and sell them if he could. In the face of these facts, a finding by a jury that there had been

a real delivery would have been more than a finding without evidence; it would have been against evidence. The case is not better for the plaintiff in error, because he and Hawkins lived together on the lot where the stable was. That fact could not dispense with an actual change of the possession. In *Hoffner v. Clark*, 5 Whart. 545, we have a case very similar to this. There the vendor and vendee were brothers living in the same house, and it was held that it furnished no ground for dispensing with such an actual change of the possession as to render it distinct and visible, so that it might become notorious. Nor is the rule different as laid down in *McVicker v. May*, 3 Pa. St. 224 [45 Am. Dec. 637]. In that case, there was an actual taking of possession by the vendee, and a removal of the property. So there was an actual delivery in *Dunlap v. Bournonville*, 26 Id. 72.

The judgment is affirmed.

SALE OF CHATTELS, UNACCOMPANIED WITH ACTUAL POSSESSION, IS FRAUDULENT AS TO VENDOR'S CREDITORS: *Jarvis v. Davis*, 61 Am. Dec. 166, and notes; *Okemery v. Palmer*, 65 Id. 493; *Sleeper v. Pollard*, 67 Id. 741; *Whitney v. Stark*, 68 Id. 360; *Born v. Shaw*, 72 Id. 633; *Call v. Gray*, 75 Id. 141; *Monroe v. Hussey*, Id. 552; *Stevens v. Irwin*, 76 Id. 500; *Grant v. Lewis*, 80 Id. 785. A voluntary sale of chattels must be accompanied with an actual change of possession; a constructive delivery is insufficient: *Barr v. Ralts*, 53 Pa. St. 257; *McKibbin v. Kline*, 64 Id. 359, both citing the principal case. A concurrent possession is one where the control and use of the goods by the vendor and vendee are so confused and mixed as to leave the question of possession uncertain: *Worman v. Kramer*, 73 Id. 386, citing the principal case. In *Evans v. Scott*, 80 Id. 138, the principal case, and others, were said to be modified by another line of decisions in that the question whether the change of possession was actual and *bona fide* should be submitted to the jury.

YEALY v. FINK.

[48 PENNSYLVANIA STATE, 212.]

TOWNSHIP OFFICERS ARE NOT PERSONALLY LIABLE FOR ACTS DONE HONESTLY, in the exercise of the discretion which the law gives them, even though that discretion be exercised so mistakenly as to work an injury to private property or private individuals; but they are liable if they act maliciously or wantonly, and if the work which they perform is done rather to injure an individual than to discharge a public duty.

TOWNSHIP SUPERVISORS ARE NOT PERSONALLY LIABLE FOR BUILDING CAUSEWAY INSTEAD OF BRIDGE, in laying out a road across a stream, thereby injuring a mill-owner below, unless they acted with a malicious design to do the mill-owner injury, or with such a reckless and wanton disregard of his interests as would be equivalent to malicious intent.

JURY MAY PROPERLY INQUIRE WHETHER INJURY WAS COMMITTED BY JOINT ACT of supervisors of adjoining townships, in erecting a causeway across a stream. The erection of the causeway was one act, though parts of it were built at different times and by different defendants.

WANT OF MALICIOUS INTENT IN BUILDING CAUSEWAY INSTEAD OF BRIDGE MAY BE SHOWN BY TOWNSHIP SUPERVISOR in an action against him for an injury caused thereby, by evidence that before the work was commenced he had received a message from a supervisor of an adjoining township that the latter would not join in building a bridge, because the people of his township were opposed to it.

TRESPASS on the case, brought by Pius P. Fink against Jacob Yealy, a supervisor of Germany township, and Edward Collins and James Taylor, supervisors of Mountjoy township. The facts are sufficiently stated in the opinion. The plaintiff had a verdict and judgment, and the defendants sued out a writ of error.

McCreary, for the plaintiffs in error.

D. McConaughy, for the defendant.

By Court, **STRONG, J.** The defendants below, now plaintiffs in error, were supervisors of two adjoining townships, the line between which was a small stream. Acting under an order of the court of quarter sessions, they made a new road which had been laid out across the stream, and instead of building a bridge over it, they made a passage-way by depositing stone in its bed, which the plaintiff below complains obstructed the flow of water to his mill. For this he has brought this suit against them, and he seeks to charge them personally with the damages which he has sustained in consequence of the alleged obstruction.

On the trial in the court below, the jury were correctly instructed that township officers are not personally liable for acts done honestly in the exercise of the discretion which the law gives them, even though that discretion be exercised so mistakenly as to work an injury to private property or to private individuals. It is an undeniable principle that neither the state itself, nor any persons, natural or artificial, acting under its authority, are responsible for any damages occasioned by the construction of a highway, unless provision has been made for compensation. The doctrine was broadly asserted in *Governor and Company of British Cast Plate Manufacturers v. Meredith*, 4 Term Rep. 794; in *Boulton v. Crowther*, 2 Barn. & C. 703; and it has ever since been maintained in the English courts. It is equally well settled in this common-

wealth. It was asserted in *Green v. Borough of Reading*, 9 Watts, 382 [36 Am. Dec. 127]; in *Monongahela Navigation Co. v. Koons*, 6 Watts & S. 101; in *Henry v. Pittsburgh & A. Bridge Co.*, 8 Id. 85; in *O'Connor v. Pittsburgh*, 18 Pa. St. 187; and in very many other cases which might be cited. The public officer is protected, however, only while acting within the limits of his authority. If under the color of his office he exceeds the power which the law has conferred upon him, he cannot shelter himself under the plea that he is a public agent. The first question in any case brought against him, therefore, is, whether he had legal authority for the acts complained of. And indeed it was held in *Mayor v. Randolph*, 4 Watts & S. 514, that no other question could arise. In that case, Judge Sergeant said, that while the agent of the state acts within the sphere of his authority, his motives or the cause of his action are not examinable. He seemed to regard it of no consequence whether the motive which prompted to the action was to promote the wishes of one man or others, or whether it was to carry out the objects of the law. In his mind, it was a mere question of power. There is no small reason for holding that the liability of a public agent to make or repair a highway for damages caused by his acts, done in pursuance of his public trust, should not begin until he has transcended his powers. In most of the cases, the suitor against him complains of a nuisance. Whether an act done be a nuisance or not involves always the inquiry whether it was contrary to law. It cannot be a nuisance if legally authorized, and to the inquiry whether legally authorized or not, the motives of the actor are quite irrelevant. Human law, except in very few cases, looks only to external conduct. Besides, if the motive with which the erection of a bridge or a causeway, an excavation or an embankment, was done, is to determine whether it be a nuisance or not, the most strange results would be accomplished. Then if the motive of the agent be bad, the work done must be undone, though its undoing be itself in direct violation of law. The party injured may sue until the nuisance be abated. No statutory remedy has been provided which assesses in one action the damages for the erection and maintenance of a nuisance.

Yet it seems to be established that if a public officer acts maliciously or wantonly, if the work which he performs be done rather to injure a private individual than to discharge a public duty, he is responsible for the consequences. He can-

not recklessly, wantonly, or maliciously invade private rights, and protect himself under the authority of the law. He is not allowed to find shelter under the wing of public authority when he is assailed for acts done for the gratification of his own malignant feelings, or with a wicked disregard of the interests of others. This principle was advanced in *Boulton v. Crowther*, 2 Barn. & C. 703; in *Jones v. Bird*, 5 Barn. & Adol. 837; in *Henry v. Pittsburgh & A. Bridge Co.*, 8 Watts & S. 85; and it is the admitted law of the commonwealth. The court of common pleas attempted to apply it to the trial of this case. But we think it was erroneously extended. The jury were instructed that the defendants were liable if, in building the passage-way over the stream, there was an intent to injure the plaintiff; in other words, if they did not build a bridge as they might have done, but instead of doing so, erected the causeway with the intent of injuring the plaintiff. Again, the jury was charged that if the defendants constructed the causeway with an intent to injure the plaintiff, he could recover, and that an intent to injure him might be inferred from the acts of the defendants, if the jury believed they were such as could have been done with no other intent, or if the evidence justified the jury in drawing such an inference. From the whole case, it is apparent that the marrow of the plaintiff's complaint was that the supervisors did not build a bridge instead of a causeway. The latter was more hurtful to the plaintiff than a bridge would have been. The obvious impression made by the charge of the court was, therefore, that building a causeway rather than a bridge was an act done with intent to injure the plaintiff, for as the hurt resulting from the causeway was certain, and as it is fairly presumable that a person intends the natural consequences of his acts, the simple act of building the causeway indicated that intent, which, in the opinion of the court, subjected the defendants to liability for damages. This was erroneous. The defendants could choose between a bridge and a causeway without exposure to a claim for damages. They were authorized to decide deliberately to build a causeway, and consequently to work increased harm to the plaintiff, and still be protected by the public authority under which they acted. A mere intent to do an act which must work harm to the plaintiff was not enough to strip them of their shield. They were defenseless only, if their intent to injure the plaintiff was malicious, or so wanton and reckless as to prove that it was malicious. A

mistake of judgment was not enough to make them liable to damages. Nor is a court and jury to review their judgment while they act within the scope of their authority. Such a measure of immunity to public officers, the interests of society and the enforcement of the laws demand. The case before us well illustrates the importance of adhering firmly to this old rule. We find no evidence in the case of any malice against the plaintiff below. That he was damnified may have been true, but the defendants have done no more than determine in the exercise of a discretion which the law gave them and commanded them to exercise, that it was better for the interests of the public committed to them to build a passage-way of stone than to erect a bridge. It is of the utmost importance that officers intrusted with such powers be protected in exercising them, without being terrified with the apprehension of personal responsibility, if their acts should result in harm to any private property. We think the charge of the learned judge of the common pleas was not sufficiently guarded. The jury should have been instructed that the plaintiff could not recover unless the defendants had acted with a malicious design to do him injury, or with such a reckless and wanton disregard of his interests as would be equivalent to malicious intent. They are not personally liable because they built a causeway when they might have built a bridge.

There was no error in leaving to the jury to find that the injury, if any, was the joint act of the defendants. The erection of the causeway was one act, though parts of it were built at different times, and by different defendants. It was all done in pursuance of a common design, and therefore the acts of one were the acts of all the agents.

But whether in doing the work each of the defendants had a malicious purpose to injure the plaintiff, is another question; and to show that Taylor, one of the defendants, was actuated by no such motive, we think he should have been permitted to prove that before the passage-way was commenced, he had received a message from Yealy, the supervisor of Germany township, that he would not join in building a bridge; that the people of his township were opposed to it. Such evidence, as it supposed a motive for the choice of a causeway rather than a bridge, tended to disprove the existence in Taylor's mind of any malice, and to account for his action without rendering necessary the imputation to him of any guilty design. Nor is it obnoxious to the criticism that it was mak-

ing testimony for themselves. The message was sent before the act complained of was done. At all events, it should have been submitted to the jury.

Judgment reversed, and a *venire de novo* awarded.

LIABILITY OF PUBLIC MINISTERIAL OFFICERS: See *Newsell v. Wright*, 39 Am. Dec. 62, and note collecting prior cases.

KLOPP v. WITMOYER.

(48 PENNSYLVANIA STATE, 219.)

EXECUTION SALE OF ENTIRE STOCK IN LUMBER AND COAL YARD IS VOID, WHEN MADE EN MASSE, by direction of the attorney of the plaintiffs in execution, to the plaintiffs, whose bid was the only one made, if there were no circumstances to justify a departure from the rule that a sheriff must sell separately or in parcels.

EXECUTION SALE OF PERSONAL PROPERTY IS NOT VOID BECAUSE PART OF PROPERTY WAS SOME DISTANCE FROM PLACE OF SALE. Although such property must be in the power of the sheriff when he sells, and where bidders may inspect it, a sale is not necessarily void because the articles are not immediately in view when sold.

PROCEEDINGS on attachment execution. John Witmoyer and Philip Arents issued executions on judgments entered up by them against Witmoyer's son, John H. Witmoyer. At the time the writs were issued, John H. Witmoyer kept a lumber and coal yard. By the direction of the attorney of the plaintiffs in execution, the sheriff put up the entire stock of lumber and coal, worth about six thousand dollars, *en masse*, and it was sold to the plaintiffs, whose bid was the only one made, for five thousand seven hundred dollars. The lumber was of various kinds and qualities, consisting of boards, planks, shingles, scantling, lath, palings, etc. The coal was partly anthracite and partly bituminous. Part of the lumber was in the yard, in town; the remainder, about one quarter in value, was at the canal, from a third to half a mile distant from the yard. The coal, worth somewhat more than three hundred dollars, was also at the canal. The sale was made at the yard, no one going to the canal to see the property there. The plaintiff in error in this case, Benneville Klopp, about seven months after the sale, brought suit on a note held by him against John H. Witmoyer, and issued an attachment execution, and summoned the defendants in error, John Witmoyer and Arents, as garnishees, seeking to recover his claim out of

the funds in their hands, produced by the alleged conversion of the lumber and coal. There was a verdict and judgment for the garnishees, and Klopp sued out this writ of error. The errors assigned fully appear in the opinion.

Levi Kline and Josiah Funck, for the plaintiff in error.

John C. Kunkel and J. W. Killinger, for the defendants.

By Court, STRONG, J. The plaintiff in error, and defendant below, can only succeed by showing that the sheriff's sale, under the execution of the defendant, was absolutely void. If it was only irregular and voidable, he is not in a position to question it. He was neither an execution or a judgment creditor of John H. Witmoyer, when the sale was made, nor was his suit commenced until more than seven months afterwards. The contest in the court below, therefore, very properly was, whether the sale was fraudulent in fact, or so conducted that the law pronounced it void. Several assignments of error have been made to the charge of the court. They present, however, but three questions, each of which will be considered.

The property sold was the stock of a lumber and coal yard. The lumber was of various kinds and qualities, consisting of boards, planks, shingles, scantling, lath, palings, etc., and was principally at the yard in the borough of Lebanon. A part of it, however, perhaps a quarter of it in value, and the coal, worth more than three hundred dollars, anthracite and bituminous, was at the canal, from a third to half a mile distant from the lumber-yard. The defendants in error were the creditors under whose judgments the property was sold, and they became the purchasers at the sale. The entire stock of lumber and coal, as well that at the yard as that at the canal, was put up by the sheriff in the mass, and struck off by him to the defendants for five thousand seven hundred dollars, theirs being the only bid made. There was evidence that the attorney of the defendants directed the sheriff to make the sale in that manner in the lump, and it was proved that it was made at the yard in town, none going to the canal to see the articles there. There was also evidence that before the day of sale, one of the defendants had offered to give credit, if the lumber was sold by the lump, but that on the day of sale he told the by-standers he had a notion to buy it himself, and that if sold in the lump it must be paid for in cash.

The question of fraudulent intent was submitted to the jury.

and in regard to that we have nothing before us. It is complained, however, that the court instructed the jury that "the sale of the property in mass was not in itself void; that the sheriff had a sound discretion so to dispose of it, and if in his honest judgment it would in that way command the best price, the sale cannot be avoided, especially by one who had no interest whatever in the subject-matter at the time of the sale." And again: "If this course [a sale in mass] was adopted without any sinister design, but with an honest conviction that, under all the circumstances, it was most advantageous for all interested, debtor, creditor, and all other creditors, it is not fraud in law, and no evidence of fraud in fact." And again, the learned judge said: "We have already said that there is not such irregularity in this sale as to render it void."

Our acts of assembly require that sales of property taken in execution shall be by public auction; and sales in any other way are void. But there is no statutory requirement that property seized must be sold in detail, in parcels, or in the aggregate. The mode of selling, whether in parcels or in mass, has been left unregulated by statute. The practice undoubtedly has been to sell in detail, or in small quantities, and such has been understood to be the duty of the sheriff. To say the least, the sale that was made in the present case was a gross irregularity, if it was not in law a nullity. The policy of the law is to multiply bidders, and increase competition. Thus, the interests of the debtor are advanced, as well as those of the creditors. It is for this reason that any attempt on the part of a purchaser to dissuade bidding avoids the sale, and leaves the property open to seizure at the suit of another creditor. But selling the entire stock in a lumber-yard, or in a store, in mass, inevitably narrows the circle of bidders, and consequently diminishes competition. Many purchasers might be found for portions of the lumber, or of the coal; few would be able to buy the whole stock and pay the purchase-money down. No more effectual mode could be adopted to enable the execution creditor to obtain the property at his own price.

It may be that here and there a person would give more for a stock of goods if sold together, than he would if sold in detail, but he is not likely to be compelled to give more by competition. The sheriff's duty is regulated, not by what might be the result in an extraordinary case, but by general rules of policy, and to those rules the public interests require that he should strictly be held. If he may sell numerous articles at

wholesale whenever he thinks they will thus bring a better price, why may he not sell privately, if, in his judgment, it would be advantageous? The statute, indeed, demands a public sale, and only legal policy requires a selling at retail; but the object of this policy and the statute is the same. It is to secure the best price for the property levied upon, and to guard against frauds. In *Rowley v. Brown*, 1 Binn. 61, where it appeared that the sheriff had sold by a lumping sale three pieces of land which might have been sold separately, though they were jointly subject to an entire ground-rent, the sale was set aside, and it was said to be the rule of this court to disallow a lumping sale by the sheriff in every case where, from the distinctness of the items of the property, we can have distinct sales. It was said to be essential to justice, and to the protection of unfortunate debtors, that this should be the general rule; any other would lead to the most shameful sacrifices of property. If such is the rule in regard to sales of real estate, *a multo fortiori* should it be in respect to sales of personalty. Abuses are more easy in the latter than in the former. Judicial sales of real estate pass directly under the inspection of the court at the acknowledgment of the deed, but over sales of personalty the court has no such immediate supervision. It is to be observed that the rule of public policy which requires sales of personal property taken in execution to be made in detail, has for its object more than the protection of the debtor and the interest of the execution creditor. Its purpose is also to protect the general creditors of the debtor against fraudulent sales under the forms of law. If a sheriff may, at his discretion, sell the entire stock of a store, of a lumber-yard, or a coal-yard in the lump, it is obvious that creditors generally are at the mercy of the debtor and a single creditor. The present case is a good illustration of the mischief. The father of a debtor levies an execution upon a large and varied stock of his son's personalty, appraised at nearly six thousand dollars. By his direction, or that of his attorney, or at least at his instance, it is offered and sold as an entirety. The father becomes the purchaser at his first and only bid. No other person could have bid unless prepared to pay more than five thousand seven hundred dollars in cash. It is easy to see how such sales, if tolerated by the law, might be converted into mere covers for the property, and prove ruinous to creditors generally. Possibly in this case the bid was not much, if any, less than what the property would have brought if sold separately or in parcels; but the policy of

such sales is not to be determined by the results of a single case, nor indeed by the motives which might have induced it.

The learned judge of the court of common pleas was of opinion that the law left it to the sound discretion of the sheriff to determine whether the property should be set up and sold in bulk, in lots, or by single articles, and that his judgment was to be regulated by what he believed would command the best price. If this be so, it is not easy to see how sales of personalty by the single article, or in lots or parcels, can be required by any rule of legal policy, or how a sale in bulk can even be an irregularity. The policy of the law must then vary with the discretion of the sheriff. That such a doctrine would be dangerous, it requires no words to show. Nor do I find that the authorities referred to by the learned judge sustain it. The first is *Perkins v. Spaulding*, 2 Mich. 157. There was a constable's sale of growing wheat in three adjoining parcels; the interest sold was an undivided interest, and the purchaser was under obligation to harvest the whole. From the very nature of the property, therefore, it could only have been sold as an entirety. In delivering their judgment, the court said it is the duty of the officer "to sell in such lots or parcels as to command the highest price. But he has a large discretion, and is not required to sell each article separately." This is the extent of that case. In *State v. Morgan*, 7 Ired. 387 [47 Am. Dec. 329], there was a sale of several articles in bulk, and it was held unlawful, though the court agreed that if the creditors had assented to such a mode of sale, they could not afterwards question it. In *Tift v. Barton*, 4 Denio, 171, the court held a lumping sale of personalty, subject to a chattel mortgage well made, because unless one man purchased the whole, he would not acquire the equity of redemption. If one purchased a part, he could not redeem *pro tanto*, and he would have no remedy at law, if he would in equity, for contribution. The case is no authority for the doctrine that selling in mass is at the sheriff's discretion. Indeed, the New York revised statutes require personal property to be sold in lots or parcels: 2 R. S. 367, 23. The only other case cited is *Wood v. Doane*, 20 Vt. 613, in which it does not appear that the property was sold in the lump. Within certain limits, doubtless, the officer must exercise his own judgment. He is not bound to sell in all cases by the single article. He may and often should sell in lots or parcels,—what lots or parcels must be left to his honest judgment; but I apprehend his discretion does not

reach so far as to authorize him to sell in mass, entirely in bulk. And if such a sale be in conflict with the established policy of the law, why must it not be worse than irregular, and therefore voidable only at the instance of the debtor or lien creditor? There may be circumstances that would justify a sale by the aggregate of personal property seized in execution. There was such in *Tift v. Barton*, 4 Denio, 171; but a purchaser who claims under such a sale ought to show their existence. *Prima facie*, the sale is not good. No circumstances were shown in the present case to justify a departure from the common rule that the sheriff must sell separately or in parcels, and we think, therefore, there was error in the unqualified instruction given to the jury, that there were no such irregularities in the sale as to render it void.

The error becomes more palpable when considered in connection with the answer which the court gave to the third point of the plaintiff below. That point was, "if the jury believe that the counsel of the execution creditors of John H. Witmoyer, under whose [executions] the property was sold, gave directions to the sheriff that the same should be sold in gross, and that the sheriff, in pursuance of such request, sold the same in that way, it was a fraud, in law, and the plaintiff was entitled to recover."

To this the court answered: "The law is not so, unless the instruction was intended for a fraudulent purpose, or there is satisfactory evidence in the case that the sale operated unjustly, by the property selling for a less price than it would have brought if exposed in lots or parcels." It is not to be forgotten that the plaintiffs in the executions were the purchasers at the sale. Now, even if the sheriff might, at his discretion, sell the entire stock of lumber and of coal, and the office furniture in mass, as the court below thought, that discretion was not to be controlled by the plaintiffs in the executions, and the purchaser. That would be intolerable. It would be, in effect, substituting the will of the creditor and purchaser for the discretion of the officer of the law. It may be and it is the law, that the sheriff is not bound to obey any legal direction. But can a party who has done all in his power, by himself or his attorney, to take away any discretion of the sheriff, be heard to say that the sheriff's discretion was exercised? Who knows how far the officer felt controlled by the direction of the attorney? In this case, the sheriff testified that he never sold in that way (in the lump) but by direction of counsel.

Liability to the plaintiff in an execution is before the eyes of a sheriff when he determines how a sale is to be made. But if he follow instructions, he is not liable to the party who has given them: *Strong v. Bradley*, 14 Vt. 55. Even, therefore, if he be under no obligation to follow instructions, they do not leave him a full discretion, and if the creditor and purchaser takes away the discretion of the sheriff even in part, how can he protect himself under a sale made in bulk? How can he insist that it was made in accordance with the demands of the law? If the question raised by the point had been whether there was actual fraud in the sale, the court would very properly have called the attention of the jury to the inquiry whether the instruction or request to sell in bulk was intended for a fraudulent purpose. But such was not the design of the point. The opinion of the court was asked upon what was alleged to be a fraud in law. They were asked to say whether a sheriff holding a *fi. fa.* levied upon a large quantity of personal property of different kinds and assorted varieties, the value of which is many thousand dollars, in pursuance of the direction or request of the plaintiff in the execution sells it all in a lump to the plaintiff, without any attempt to sell by parcels, such a sale is valid in law,—whether it is a judicial sale so made as to pass the title to the purchaser, that purchaser being himself the plaintiff in the execution. We think the court should have affirmed the plaintiff's third point and pronounced such a sale void in law. The public interests require that a watchful eye shall be kept upon sheriffs' sales, and that those officers shall be held rigidly to the performance of their duty. And the plaintiff in an execution cannot be permitted to do anything which tends to restrain bidding or limit competition, and himself become the purchaser.

The remarks of Judge Coulter in *McMichael v. McDermott*, 17 Pa. St. 358, are sound: "The principle is that he who has the absolute control of the sale for his own benefit cannot be a purchaser, unless there is fair competition of bidders, or a lawful opportunity given for such competition; otherwise the property of the debtor might be sacrificed. And even the consent of the debtor would not cure the defect, for there is often collusion between him and a particular creditor. The other creditors have an interest that must be protected."

The court was also asked to charge the jury in substance that the sale was void, because a portion of the property was from a third to a half a mile distant from the place of sale.

We think the answer of the court to this request was unexceptionable. Doubtless, personal property must be in the power of the sheriff when he sells, and where bidders may inspect it. But a sale is not necessarily void because the articles are not immediately in view when sold. The remarks of the learned judge upon this subject were discriminating and just. We discover no other errors in the record than those which we have noticed.

The judgment is reversed, and a *venire de novo* awarded.

On a subsequent trial of the principal case, *Klopp v. Witmoyer*, 43 Pa. St. 226, it appearing that John H. Witmoyer had afterwards confirmed and ratified the sale, it was upheld.

CHATTELS SHOULD NOT BE SOLD ON EXECUTION EN MASSE, IN GENERAL: *McLeod v. Pearce*, 11 Am. Dec. 742; *Fresman on Executions*, sec. 296; and as to separate tracts of land, see *Wilson v. Twitty*, 14 Am. Dec. 569; *Nesbitt v. Dallam*, 28 Id. 236; *Rector v. Hartt*, 41 Id. 650; *Smith v. Randall*, 65 Id. 475. But while sheriffs' sales of personal property *en masse* may be evidence of fraud, they are not fraudulent *per se*: *Furbush v. Greene*, 108 Pa. St. 507, commenting upon the principal case; and see it also commented upon in *Yost v. Kline*, 105 Id. 631, 632, in holding a sale of goods not to be one *en masse*, but in parcels.

PRESUMPTION OF GOODS SOLD AT SHERIFF'S SALE, WHETHER REQUIRED: See *McNeeley v. Hart*, 49 Am. Dec. 404, and note collecting prior cases. The principal case is cited in *Bennett's Branch Improvement Co.'s Appeal*, 65 Pa. St. 252, to the point that personal property must be in the power of the sheriff when he sells, and where bidders may inspect it.

JOHNSON v. MEHAFFEY.

[48 PENNSYLVANIA STATE, 306.]

ROLLS CAST FOR ROLLING-MILL DO NOT PASS AS REALTY TO PURCHASERS, where they were paid for and delivered at the mill, but lay beside it, without being turned or finished off, or put into the mill.

REPLEVIN by Johnson & Co. against Lindsey Mehaffey, for two rolls, which had been cast for the rolling-mill of William McKinney. The rolls had been paid for and delivered at the mill, where they remained for about three years, in a rough and unfinished condition, without having been put into the mill. McKinney then failed, and the mill was sold to the plaintiffs. The rolls were afterwards taken in execution, as the personal property of McKinney, and sold by the sheriff to Mehaffey. The defendant had judgment.

By Court, LOWRIE, C. J. These rolls were cast for this rolling-mill, and paid for and delivered beside it, and lay there two or three years without being turned or finished off, or put into the mill, and then the mill was sold by the sheriff. Do the rolls go with the mill to the purchaser? The test question is, Were they elementary parts of the mill at the time of the sale? And as matter of fact, it is quite plain that they were not; for the mill had always run without them. No doubt they were intended to be made part of the mill, but we do not see how we can take the intention, without fact, in order to declare what constitutes the mill. If we do, then the sale of a half-built or half-ruined house would include all the materials provided for its completion or repair.

A very provident man is quite sure to have on hand materials which he sees will sometime be necessary for the repair of his works, or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus he will provide extra saws for a saw-mill, or bolting-cloth for a flour-mill, or extra castings for the running gear, or lumber, nails, screws, and other materials, to make improvements or repairs; but this prudence does not convert personal into real property so long as the fact remains that they are not yet made constituent elements of the mill or other structure. That fact we can ascertain and define with reasonable certainty, but we can have no measure for the ever-varying degrees of prudent forethought. And if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us. Besides, it is rather a contradiction in terms to say, at the same time, that they are parts of the structure, and are intended to be made so.

That these rolls will fit no other mill, does not make them part of this one, or prove them so. Furniture for a dwelling-house, shelving and drawers for a store, boilers and fly-wheel for an engine, the frame for an addition to a house, have often this very peculiarity, and great loss would arise if they should not be applied according to the intention with which they were made; yet they cannot be a part of the real estate without a purpose of annexation actually effectuated, though this peculiarity of adaptation may, by inference or corroboration, supply the want or the weakness of direct evidence of annexation, whenever this fact can be reasonably said to be left in doubt by the other evidence.

The rolling-mill, consisting of all its constituent parts, as it was actually constructed and used at the time of the sale, is all that passed by the sale, and therefore these rolls were not included.

We have expressed similar views to these in the case of *Wright v. Pyne*, 17 Leg. Int. 354, from Lancaster County, decided in 1860.

Judgment affirmed.

ROLLS FOR ROLLING-MILL, WHEN PASS BY CONVEYANCE OF MILL: See *Pyle v. Pennoek*, 37 Am. Dec. 517. As to what are fixtures in general, see *Bishop v. Bishop*, 62 Id. 68, and note classifying prior cases. As to when machinery in particular is a fixture, see *Teaff v. Hewitt*, 59 Id. 634, and note collecting prior cases; *Richardson v. Copeland*, 66 Id. 424; *Symonds v. Harris*, 81 Id. 553. For the criterions by which to determine whether a thing is a fixture or not, see *Teaff v. Hewitt*, *supra*, and the notes thereto. In *Commonwealth v. Young*, 11 Phila. 607, it was said that the language of Chief Justice Lowrie, in the principal case, was to the effect that in determining questions concerning fixtures, intention was not to be considered, and that rolls for a rolling-mill, not actually attached, are personal estate.

GARRETT v. DEWART.

[42 PENNSYLVANIA STATE, 342.]

PURCHASER AT SHERIFF'S SALE OBTAINS NO GREATER INTEREST IN LAND BY PAYMENT OF ALL OF PURCHASE-MONEY before it was made payable by the conditions of the sale, than he would have had without an anticipated payment.

TITLE OF PURCHASER AT SHERIFF'S SALE, AFTER OBTAINING DEED, DOES NOT RELATE BACK TO DATE OF HIS BID, so as to divest from that time the ownership of the debtor whose land has been sold. Until the sale has been consummated by the acknowledgment and delivery of the deed, the debtor is entitled to the possession with all its attendant advantages.

PURCHASER OF LEASED PREMISES AT SHERIFF'S SALE HAS NO RIGHT TO RENT accruing between the time of the sale and the time of the acknowledgment and delivery to him of the sheriff's deed, according to the conditions of the sale; nor does the fact that the mortgage, under which the sale was decreed and made, was anterior to the renewed lease to the tenant, strengthen the purchaser's claim to the rents which had accrued when the sale was made, and while the mortgagor was in possession.

COVENANT for rent claimed to be due, by William L. Dewart against George Garrett. The facts are sufficiently stated in the opinion.

George Hill and George F. Miller, for the plaintiff in error.

Joshua W. Comly, for the defendant in error.

By Court, STRONG, J. We are of opinion that the rent which is in controversy in this case had accrued before the acknowledgment and delivery of the deed to the purchasers at sheriff's sale. By the terms of the lease, the grain in which the rent was payable was to be delivered to the landlord in the mow or corn crib. Then, that is, after its delivery, the tenant was under obligation to thrash it, and deliver it at some storehouse; and he covenanted to thrash and deliver all the grain except corn, whenever, in each year, he might be directed by the landlord to do it. The dispute in this case relates to the wheat and oats. The wheat was sown on the demised premises in September, 1859, and the oats were sown in April, 1860. Both crops were harvested and put in the mow in July 1860. On the 1st of August in that year, the landlord gave notice to the tenant to thrash and deliver the crops by the 1st of September then next following, but they were not thrashed until October and November. Now, if it be conceded that the time of delivery in the mow was not the time fixed for the payment of the rent, it is not to be questioned that the rent was payable when the landlord directed the grain to be thrashed and delivered. It matters not what the custom of the country is in regard to the time of thrashing. The parties did not leave the time to be determined by custom. They defined it by their contract. Nor has it anything to do with the case, that the grain may not in fact have been so delivered as to vest the ownership in the landlord, so as to enable him to maintain replevin. The inquiry in hand does not relate to the ownership of the grain. It is, When was it deliverable or payable according to the contract? For when the rent became due and payable, then it had accrued. In every aspect of the case, therefore, the rent must be considered as having accrued by the 1st of September, 1860.

The sheriff's deed of the landlord's interest in the farm was acknowledged and delivered on the 27th of September, 1860, after the rent had accrued or become due and payable. The purchasers at the sheriff's sale are not then entitled to the grain, unless their position is improved by the other facts found in the case stated, to which we will now refer. The sheriff's sale was made on the 21st of May, 1860, and the conditions of the sale were that "thirty per cent of the purchase-

money should be paid when the property was struck down, and the balance at the September court then next, when a deed would be acknowledged and delivered to the purchaser." Upon these conditions, the property was struck down. The purchasers appear to have paid the whole amount of their bid at once, and to have notified the tenant that they claimed the landlord's share of the grain. Exceptions to the confirmation of the sale were filed by the landlord, but they were overruled, and the deed was acknowledged and delivered at the time appointed in the conditions of sale. The tenant continued in possession of the demised premises under the lease until the 1st of April, 1861, when a new lease was made to him by the purchasers.

It hardly needs be said that the payment of all the purchase-money before it was made payable by the conditions of sale gave the purchasers no greater interest in the land than they would have had without an anticipated payment. By the contract, they were not entitled to a deed until the September court, and it may fairly be presumed that they bid less because the delivery of the deed was to be so long delayed.

The argument of the plaintiff in error is, that when the property was struck off to the purchasers, May 21, 1860, they acquired an inceptive interest in the farm; that when the deed was subsequently made to them, their title related back to its inception; and that they became the owners of the reversion from that time. It is true that it has been held that a bidder at a sheriff's sale, to whom the property has been struck down, has an inceptive interest in it which may be bound by the lien of a judgment, even before the acknowledgment of the sheriff's deed. Yet it by no means follows from this, that after he has obtained his deed his title relates to the date of his bid in any such sense as to divest from that time the ownership of the debtor whose land has been sold. Undoubtedly, it does not. Until the sale has been consummated by the acknowledgment and delivery of the deed, the debtor is entitled to the possession with all its attendant advantages. Until then, the purchaser cannot move a step towards dispossessing the debtor or his tenant; and though he may have a possible or inceptive interest, like a purchaser by articles who has paid no money, he has acquired no title to the present enjoyment. His rights, as against a tenant of the execution defendant, are clearly defined in section 119 of the act of June 16, 1836, entitled "An act relating to executions." It is there declared that he shall

be deemed, upon receiving a deed for the land, "the landlord of such tenant, lessee, or other person, and shall have the like remedies to recover any rents or sums accruing subsequently to the acknowledgment of a deed to him," as the defendant might have had, if no such sale had been made. Decided cases also recognize the right of a purchaser to no other rents than such as accrue after the acknowledgment of the sheriff's deed and its delivery: *Scheerer v. Stanley*, 2 Rawle, 278; *Boyd v. McCombs*, 4 Pa. St. 146. In cases where the mortgage or judgment under which the property has been sold is paramount to the lease, he has the option to affirm or disaffirm the lease. If he disaffirms it, he can claim no rent: *Farmers & M. Bank v. Ege*, 9 Watts, 436 [36 Am. Dec. 180]. If he affirms it, he becomes landlord only from the time when he receives his deed. In this case, the tenancy was affirmed.

The fact that the mortgage under which the sale was decreed and made was anterior to the renewed lease to the tenant, does not strengthen the claim of the purchasers to the rents which had accrued when the sale was made. The profits of land belong to the person who is in rightful possession by himself or his tenants. The mortgage did not disturb the mortgagor's right to the possession. That was done only by the sale.

It follows that there was no error in giving judgment for the plaintiff on the ease stated. There appears, however, to have been an error in the amount, which we correct.

Judgment affirmed for \$624.17, with interest from November 4, 1861.

SHERIFF'S DEED, WHETHER RELATES BACK TO TIME OF SALE: See *Rogers v. Brent*, 50 Am. Dec. 422, and note; *Doe ex dem. Hutchinson v. Horn*, Id. 470; note to *Keaton v. Thomasson's Lessee*, 58 Id. 55; *Leger v. Doyle*, 70 Id. 240; and see *McMillan v. Richards*, Id. 655; *Reynolds v. Harris*, 76 Id. 459. The principal case is cited in *Hardenburg v. Beecher*, 104 Pa. St. 23, to the point that the title acquired under a sheriff's deed does not relate back so as to wholly divest the legal ownership of the debtor, who, until the acknowledgment of the deed, is entitled to the possession, with all its attendant advantages.

KENNEDY v. KENNEDY.

[42 PENNSYLVANIA STATE, 412.]

EQUITY HAS JURISDICTION TO DECREE QUIET ENJOYMENT OF LAND ALLOTTED UNDER PAROL PARTITION BETWEEN JOINT OWNERS, after a long acquiescence and possession thereunder.

EQUITY WILL NOT DECREE QUIET ENJOYMENT OF LAND ALLOTTED UNDER PAROL PARTITION, unless the partition is complete. A decree will not be granted, therefore, where a division line was run, but the owelty of partition contemplated was not adjusted and paid.

BILL in equity by David Kennedy against Samuel Kennedy. The complainant alleged that the parties to the bill had acquired a certain tract of land by devise from their father, James Kennedy; that they had afterwards amicably agreed to make partition thereof; that they had caused a division line to be run, and had made an allotment to each of his proper share in severalty; and that each of the parties went into possession of his portion, and continued to occupy the same, the complainant making valuable improvements on his part. The object of the bill seems to have been to obtain a decree of quiet enjoyment. The defendant denied that the parties had agreed upon and made such division, consentable line, and allotment, as alleged by the complainant, but asserted that the line was run merely to ascertain whether the parties could make a permanent division by the line by an agreement between themselves as to the value of the land and improvements on each side of the line, and by one paying to the other such sum of money as would make the two parts, with the improvements on the same, respectively equal in value; but that the parties never came to any conclusion on the subject. The evidence showed a devise of all the testator's property to his sons David and Samuel, "to be jointly held by them until Samuel arrives at the age of twenty-one, when, at their pleasure, they are to make equal division." Samuel had arrived at the age of twenty-one at the time of his father's death. Afterwards, the parties procured a line to be run through the land for the purpose of making partition; David, by a verbal understanding, taking the part on which buildings were erected. Some two or three years after the line was run, a fence which stood on part of it was built upon the remaining portion. Samuel for several years worked the entire tract, the parties dividing the crops raised upon David's part. Each party was assessed and paid taxes on his particular portion. The parties lived together in the house on David's part until David married, when

David built another house and moved into it, leaving his brother in the old house. There was some understanding about David paying Samuel the value of the improvements which were upon David's part. The court dismissed the bill for want of jurisdiction, and because the proof did not sustain the allegations.

Hamilton and Acheson, for the appellant.

R. and S. Woods, for the defendant.

By Court, STRONE, J. This is not a bill for partition. On the contrary, it avers that partition has already been made by the agreement of the parties. Its object is rather to obtain a decree for the quiet enjoyment of the land, which the complainant alleges became his in severalty by virtue of a former parol partition. Courts of equity have jurisdiction in cases of partition, and possibly, where there has been long acquiescence and possession under a parol division of lands previously held in common or joint tenancy, equity will quiet the enjoyment of such estates. Such seems to have been the opinion of Lord Hardwicke, in *Ireland v. Rittle*, 1 Atk. 541. And there are very many cases analogous to bills of peace, in which a chancellor has interfered to quiet the enjoyment of a right, or to establish it by a decree, or to remove a cloud from the title. Indeed, this is one of the well-recognized branches of equitable jurisdiction, though its extent is not clearly defined.

The difficulties in the way of the complainant in this case are found not so much in the jurisdiction of the court as in the failure of proof that there ever was a complete parol partition. Unless there was, the complainant manifestly has no case,—no title in severalty, either in law or in equity. It is not enough that the parties agreed to fix a line of division between them, and that they actually ran and marked such a line, if it was also a part of the arrangement that owelty should be adjusted. Fixing the amount of owelty was as essential to the partition as was the adoption of the dividing line. In this case, all the evidence, as well as the report of the master, shows that the farm which the parties held in common was not divided equally in quantity or in value. All the buildings stand upon the part which the complainant claims to have been allotted to him, and it was contemplated by both parties that owelty should be agreed upon and paid. What that should be was, however, never determined, and therefore there never was complete partition. All the steps

taken were necessarily but experimental, and as insufficient to convert the joint ownership into ownership in severalty as would be a sale to pass title without any agreement for the price. In view of the facts, established beyond contradiction, that an equalization of the value of the two parts of the farm was intended to be made by the agreement, and that it never was, it is hard to believe that the division line was run for any other purpose than (as asserted by the defendant) to ascertain whether the parties could make permanent partition and division by said line, by an agreement between themselves as to the value of the land and improvements on each side of the line, and by the one paying to the other such sum of money as would make the two parts, with the improvements on the same, respectively, equal in value. But if not so, the validity of the division is dependent upon an adjustment of owelty, and as that has never been agreed upon, it is not for a court of equity to make a contract for the parties, or in such a bill as this, which is not for partition, to decree how much owelty shall be paid. The complainant has, then, no equity to a decree for the quiet enjoyment in severalty of the land which he asserts was allotted to him under a parol partition. Partition has never been made.

The decree of the district court, dismissing the bill of the complainant, is affirmed, with costs.

BILLS OF PEACE, WHEN ENTERTAINED: See *Woodcock v. Seely*, 50 Am. Dec. 445, and note discussing the question; *Lyerly v. Wheeler*, 59 Id. 598.

EQUITY WILL NOT DECREE PARTITION WHEN TITLES ARE NOT CLEAR: *Hassam v. Day*, 77 Am. Dec. 684, and note.

McKOWEN v. McDONALD.

[43 PENNSYLVANIA STATE, 441.]

DEMURRER TO EVIDENCE ADMITS NOT ONLY FACTS STATED IN EVIDENCE, but also every conclusion which the jury might reasonably infer therefrom.

PAROL CONTRACT TO CONVEY LAND IS WITHIN STATUTE OF FRAUDS, unless there has been such a part performance as cannot be compensated in damages.

PAROL CONTRACT TO CONVEY LAND IS NOT TAKEN OUT OF STATUTE OF FRAUDS by the fact that in pursuance of it, a son left his trade in town to go upon a farm, cleared and fenced the land, erected farm buildings, planted an orchard, and the like, under a promise by his father to give him the land in consideration of his services, and his coming to live thereon.

EJECTMENT by John B. McDonald and others, claiming under John McKowen, Sen., deceased, against John McKowen, Jr., a son of the deceased. The facts are fully stated in the opinion.

A. W. Loomis, and Hamilton and Acheson, for the plaintiffs in error.

C. Shaler, for the defendant in error.

By Court, WOODWARD, J. This was not a suitable case for a demurrer to evidence. The title of the defendant below, which rested in parol, was made out by proof of the declarations of his father, an old man who died in 1855, at eighty-two years of age. These declarations ran through the last six or seven years of the old man's life, and imported that he had induced his son John to remove from Allegheny City to the farm in question, and to improve it, by a promise that it would be given him as his share of the father's estate. No witness described a bargain between the father and son, face to face, and no one reported any declarations of the son concerning the bargain, but that he removed and took possession of the farm, cleared land, and erected buildings; and that his father was heard to declare, on several occasions, that he had given him the farm, or meant to give it, and that he pointed out the division line between himself and son, were fully proved. To this evidence, given on the part of the defendant below, the plaintiffs demurred, and thus precluded themselves from giving any evidence of the son's declarations during the seven years that he lived on the farm before his father's death. We have seen too many of this class of cases to doubt that in so considerable a period the son must have explained to many persons the reasons of his coming there, and how he held the farm; and when a contract that is to be a permanent title to land is made out by mere hearsay declarations, it is always satisfactory to hear from both parties. Nothing can be more disagreeable than to be called on to decree specific execution of a contract not otherwise proved than by the incidental and *ex parte* declarations of one of the contracting parties. Had the declarations of both parties been submitted to the jury with proper instructions, they would have ascertained the existence and the terms and conditions of the contract, if indeed the parties ever consummated a contract. The demurrer withdrew the case from the jury, and excluded all rebutting proofs. The question upon demurrer to evidence is

whether the matters already shown, admitting them to be true, be sufficient to maintain the issue. On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer unless the party demurring will distinctly admit upon record every fact and every conclusion which the evidence tends to prove. But if this is not done, the court will consider everything as admitted which the judge below would have required to be admitted before he would have compelled a joinder in demurrer. A demurrer admits not only the facts stated in evidence, but also every conclusion which the jury might reasonably and fairly infer therefrom.

Applying these principles to the evidence demurred to in this case, we have no doubt a jury would have inferred that a contract existed betwixt the father and son; that the son went into possession, and made improvements on the faith of that contract, thus furnishing a legal consideration, and that the land was sufficiently designated by metes and bounds. But nevertheless, the contract thus inferred was a parol contract, and therefore within the statute of frauds and perjuries, unless the possession and improvements were such as to take it out of the operation of the statute. And whether they were or were not, depends on the question whether they could be reasonably compensated in damages. We said in *Postlethwait v. Freese*, 31 Pa. St. 474, that every parol contract for land is within the statute of frauds and perjuries, except where there has been such part performance as cannot be compensated in damages.

The question on this record, therefore, has not reference to the existence of a parol contract, nor to its part execution, but to the possibility of compensating that part execution in damages.

It cannot be pretended, nor indeed was it very much insisted on in argument, that the improvements put upon the land by the defendant were incapable of fair appraisement and compensation. The clearing and fencing land, the erection of farm buildings, the planting of an orchard,—these are very common and familiar objects of valuation. The timber for improvements was at hand on the land itself, and there were some cleared acres for John to crop, from the time he took possession. What his labor was worth beyond the fair rental of the place would be an easier question for a jury than many questions habitually committed to them. But it is supposed there

was that in the circumstances of John to distinguish his case from a case involving merely a valuation of improvements. He was one of the eight children his father had by his first wife, and before he was twenty-one, he abandoned his father in consequence of the father's second marriage. He learned the trade of a carpenter, and followed it in the summer-time, trading on the river part of the time in the winter. His residence was in Allegheny town, and it was from there he was induced by his father to remove to this farm. Here was an exchange of an urban for a rural residence, and the transformation of a carpenter into a farmer. It does not appear from the evidence that John enjoyed any peculiar advantages from his residence in Allegheny, or that he was called on to make any special sacrifice in exchanging mechanical pursuits for those of agriculture. He was a mechanic of ordinary thrift, though it would seem without steady employment all the year. It is quite conceivable that a mechanic might be seduced from a highly advantageous position and business into the improvement of a dilapidated farm, with such assurance of a permanent home for his family that no probable assessment of damages would compensate the disappointment of his hopes. But was this such a case? We see nothing in the evidence to mark it with any peculiarity. It seems to us to be the ordinary case of a father placing his son on part of his land under a promise of conveyance either by deed or will, and then dying without execution of the purpose. Such a case is fit for damages to the full value of the improvements, less a fair rental for the occupancy, but is not fit to be taken out of the operation of the statute of frauds and perjuries. The maintenance of that statute, as a rule of property, is a matter of great public concern. In upholding it with a firm hand, as we conceive it is our duty to do, we are sometimes grieved to be obliged to disappoint the expectations of a family; but when we reflect that the law does not suffer labor spent in improvements to go unrewarded, and that its demand for some note in writing to evidence a bargain for real estate is not an unreasonable or oppressive exaction, the hardship of a case like this dwindles to less than the small dust of the balance. To make the most of the hardship, it cannot justify us in placing ourselves in opposition to the statute. John lived beside his father some seven years without obtaining the note in writing, which the law enjoined him to possess, if he meant to hold so considerable a share of his father's land against so large a family of

children. His equities resemble in some respects those of the son in *McClure v. McClure*, 1 Pa. St. 378, and like those in that case, they must give way to the statute.

The judgment is affirmed.

PART PERFORMANCE AS TAKING PAROL CONTRACT FOR SALE OF LANDS OUT OF STATUTE OF FRAUDS: See *Wynn v. Garland*, 68 Am. Dec. 190, and the note thereto. In order to take a parol contract for the sale of lands out of the statute of frauds, in Pennsylvania, such a performance or part performance by the vendee must be shown as cannot be compensated in damages: *Overmeyer v. Koerner*, 81½ Pa. St. 522; *Hart v. Carroll*, 85 Id. 510; *Allison v. Burns*, 107 Id. 54, all citing the principal case; and such a part performance is not shown where it consists only in labor, clearing, and fencing land, and the erection of farm buildings: *Moyer's Appeal*, 105 Id. 437, citing the principal case.

IMPROVEMENTS BY SON ON FATHER'S LAND, UNDER PAROL PROMISE BY FATHER TO GIVE SON LAND, whether will take the case out of the statute of frauds: See *Poorman v. Kilgore*, 67 Am. Dec. 425; *Cox v. Cox*, Id. 432; *Moore v. Pierson*, 71 Id. 409; *Smith v. Administrators of Smith*, 78 Id. 49, and the notes thereto.

GRAFF'S EXECUTRIX v. KELLY'S EXECUTORS.

[43 PENNSYLVANIA STATE, 422.]

VENDOR OF LAND, UNDER EXECUTORY CONTRACT, CANNOT RECOVER BALANCE OF PURCHASE-MONEY FROM VENDER, where he recovers judgment against the vendee, on the vendee's failure to pay the first installment due, and becomes the purchaser of the land at sheriff's sale.

COVENANT by Elizabeth Graff, executrix of Henry Graff, against J. M. Kelly and J. P. Jack, executors of John Kelly. The facts are stated in the opinion.

J. Bredin, for the plaintiff in error.

Thompson and Ash, for the defendants in error.

By Court, **WOODWARD, J.** In July, 1854, Henry Graff sold to John Kelly, by articles of agreement, one hundred acres of land in consideration of \$530, which Kelly covenanted to pay as follows: \$230 on the 1st of April, 1855, \$200 on the 1st of April, 1856, and the balance of \$100 on the 1st of April, 1857, with interest. Having failed to make the first payment, suit was brought against Kelly, and a judgment recovered therefor, and under this judgment the land was sold at sheriff's sale, to John Graham, for \$550. The present action is brought for the balance of purchase-money, and interest. The defense was, that the sheriff's sale of the premises for the first installment

of purchase-money extinguished the covenant on which the suit is founded. The court was of that opinion, and sustained the defense.

It does not appear from the record whether Graham purchased for Graff, but from the course of the argument, and especially from the fact that the court assumed the "reinvestment of the title in the vendor at his own election," we take it for granted that it was well understood in the court below that Graff, or his estate, was the purchaser at the sheriff's sale, and that the amount bid was applied to the purchase-money mentioned in the articles. If so, there remains unpaid only thirty dollars of purchase-money, and interest, to be recovered in this suit, and the question is, whether a vendor, after repossessing himself of the equitable estate of the vendee, can enforce payment of the balance of purchase-money.

It seems to us that this question was definitively settled in *Purviance v. Lemmon*, 16 Serg. & R. 292; *Chew v. Mather*, 1 Pa. St. 474; *Day v. Lowrie*, 5 Watts, 412.

The articles of agreement made Graff a trustee of the legal title for Kelly, who could obtain it only by paying according to the tenor of the contract. The right to acquire the legal title on such terms constituted Kelly's equitable interest in the land, which would have increased with each payment of purchase-money, until, on full payment, it would have ripened into a perfect legal estate. But by failing to pay, and by the use of Graff's legal remedies, the relation of trustee and *cestui que trust* was destroyed, and the equitable was reunited to the legal estate. Nothing being left in Kelly, for what was he to pay? His contract was mutual when made; he was to have the land in consideration of his payments,—but after the sheriff's sale his equitable right to demand the title, in exchange for his money, was gone, and if his liability to pay remained, it would be a liability that survived the mutuality of the contract. For Graff's executrix would not be obliged to convey, though Kelly's representatives should pay the purchase-money in full. When the mutuality of a contract is destroyed, the contract itself has ceased to exist. It was no part of this contract that the vendor should recover to himself both the land and the purchase-money. When he took the land, he gave up purchase-money, just as he would have been compelled to give up the land upon taking the purchase-money.

This ruling does not conflict with various cases that have

beer, decided upon their special circumstances, and with others where the question was of distribution among lien creditors, but it rests on the broad and natural equity of mutuality which underlies all contracts. Yet it was urged in argument that reason and justice demand that men should live up to their contracts in regard to land as in respect to everything else, and it was said that a house or other chattels, sold on execution for part of the purchase-money, would be no excuse for not paying the balance of purchase-money. The argument forgets the distinction between real and personal contracts. When a man makes a real contract, it ought to be enough to hold him to the law of a real contract, and the law never did so administer this class of contracts that a vendor might keep his land and still make a vendee pay for it. The law of the land entered into and became part of the contract, and hence it may be said that the vendee is living up to his contract when he insists that it is extinguished by the acts of the vendor. It would not be reasonable to hold him to the law of contracts about personalty, since he made no such contract.

Another suggestion is, that a vendee under executory articles stands, as to his vendor, as a mortgagor to mortgagee. Suppose he does, can a mortgagee, after buying in the estate of his mortgagor, have an action for money on the mortgage? Neither *Neil v. Thompson*, 4 Watts, 405, nor *Pierce v. Potter*, 7 Id. 478, answers that question affirmatively. A precedent contract may be kept afoot in respect to part of the land not embraced in the mortgage, or payments may be enforced by proceeding on notes or bonds accompanying the mortgage, but the direct remedies of the parties on the mortgage cannot survive the destruction of the relation of mortgagor and mortgagee. It is only an imperfect likeness, however,—that between a vendee under articles and a mortgagor. The one has only an equity; the other, the whole legal estate. The contract of the one is executory; of the other, executed. The vendee stands in a relation of some confidence to his vendor,—there is no confidence in the relation established by a mortgage. Differing in so many of their features, there is no rule of law necessarily common to both, though that which we assert here might, perhaps, be applied to a mortgagor. If he were bound by no instrument but his mortgage, it would be difficult to enforce that further than to exhaust his estate.

These observations, in connection with those of the court be-

low, are a sufficient answer to the positions assumed in support of this writ of error.

The judgment is affirmed.

THE PRINCIPAL CASE IS QUOTED in *Bowser's Appeal*, 101 Pa. St. 470, in holding that when a vendor institutes an action founded upon a contract for the sale of land, recovers a judgment for the purchase-money, and proceeds by execution to sell the land, he must be considered as selling all the estate in the land which he agreed to sell to the vendee.

BAGGS'S APPEAL.

[42 PENNSYLVANIA STATE, 512.]

BILL OF REVIEW WILL NOT LIE ON ADMINISTRATOR'S ACCOUNT, in Pennsylvania, finally settled eleven years before by a decree of the court, because barred by the act of October 13, 1840, requiring bills of review to be brought within five years after the final decree, and because the claim to a distributive share asserted therein was not presented within seven years after the intestate's death, as required by the act of April 8, 1833.

ACT OF LEGISLATURE IS UNCONSTITUTIONAL AND VOID IF IT DIRECTS ORPHANS' COURT TO GRANT REVIEW OF ADMINISTRATOR'S ACCOUNT and of the decree of distribution of an estate, on the petition of any party interested, with the same effect as if application had been made within five years after the decree, as required by a general statute, when the act was passed nearly twelve years after the distribution of the decedent's estate, and the final decree thereon.

LEGISLATURE HAS NO AUTHORITY TO DIRECT COURTS WHAT DISPOSITION THEY SHALL MAKE OF PARTICULAR CASE or question that comes before them; and any legislative commands about such matters, other than those contained in the general law of the land, are unconstitutional and void.

BILL of review presented by Mary Baggs and Sarah Blessing, on the account of J. H. Baughman, administrator of Andrew Hendrickson, deceased. Hendrickson died February 15, 1844, possessed of certain personal property, leaving as his nearest relatives two sisters of the whole blood, and one of the half blood on his mother's side. Baughman was appointed administrator, and on February 14, 1845, filed his account, showing a sum of money in his hands ready for distribution. On August 16, 1845, an auditor was appointed to distribute the amount, and on November 4, 1846, he filed his report awarding it all to Elizabeth Baughman, a sister of the full blood of the decedent, who was the only party interested represented before him. The auditor was of the opinion, from the evidence, that the other sister of the whole blood was dead, and he did not appear to have heard of the half-sister at all. The report

was confirmed on November 25th following, and the administrator paid over the amount in his hands to Elizabeth Baughman. The petitioners, the parties in interest who had not attended before the auditor, lived in a distant part of the state, and did not hear of the intestate's death for several years. They consequently made no application for a writ of review within the time required by the statute; but on April 22, 1857, they procured the legislature to pass an act which provided, "that it shall be the duty of the orphans' court of Allegheny County, on the petition of any party in interest, to grant a review of the administration account and auditor's report, and decree of distribution thereon, of John H. Baughman, administrator of Andrew Hendrickson, late of Versailles township, Allegheny County, deceased, with the same effect as if application had been made within five years next after such decree." Under this act an auditor was appointed, who made a report distributing part of the estate to the petitioners. The court set aside this report, and an appeal was taken.

Purviance and Shiras, for the appellants.

Penny and Sterrett, for the appellees.

By Court, LOWRIE, C. J. This is a bill of review in the matter of the account of J. H. Baughman, administrator of Andrew Hendrickson, in which the petitioners claim a share of the estate of the decedent as next of kin. It was presented thirteen years after his death, and eleven years after the estate had been distributed and finally settled by the decree of the court. It is therefore barred by the act of the 8th of April, 1833, section 19, relating to the distribution of intestates' estates, and requiring such claims to be presented within seven years after the intestate's death; by the act of the 13th of October, 1840, section 1, requiring that bills of review shall be brought within five years after the final decree; and without this, by the limitation of seven years for writs of error, which is received as a binding analogy for bills of review, when there is no positive rule given by the legislature.

The petitioners lived in a distant part of the state, and did not hear of the intestate's death until long after those periods had elapsed; but it is not pretended that these facts are sufficient to relieve their case from these limitations of the right of action. It stands therefore decreed in due course of law, and according to the general law of the land, finally decreed that this administrator has faithfully and fully performed all his

duties as administrator, and that he and his sureties are finally discharged from all further accountability in relation to this estate. How do the petitioners attempt to evade this decree?

They found their petition or bill of review entirely on an act of assembly, passed the 22d of April, 1857, near twelve years after the final decree, which makes it the duty of the court, on the petition of any party interested, to grant a review of the account, and of the decree of distribution, with the same effect as if application had been made within five years after the decree. This is a very clear and peremptory legislative injunction, unevadible by any skill of interpretation. Yet it does not affect the proviso of the act of 1840, which limits the bill of review to cases where the balance has not been actually paid by the accountant, as was the fact here. This proviso might produce injustice in some cases, if there could be no bill of review, as against the distributees, in case of payment to them; but we pass this. The orphans' court obeyed the legislative injunction by granting the review, and on final hearing, dismissed the bill on the ground that the case was entirely a judicial one, and the legislature had no authority to interfere.

This principle seems to us just as plain as the injunction of the act of the assembly, and much more authoritative; for it is part of our frame of government on which the legislature itself depends. There can be no constitutional objection to the commands of the legislature, or of any one else, to the courts to hear any motion or petition that any party may choose to present; but if the courts are the judicial authority of the land, no one has any authority to direct them what disposition they shall make of any case or question that comes before them. And any commands about such matters, other than those contained in the general law of the land, are quite useless; for the courts are, by the constitution, open to everybody appearing in any regular way. And they hear everybody that comes; though in cases very plain or very absurd they may not hear them long, and may dismiss their motion or petition without hearing the other side. There ought to be no arbitrary governmental dealing with private rights; to prevent this is one of the principal purposes of the separation of legislative and judicial functions in the government. It is in general guarded against by allotting to each department its appropriate functions, and by the assurance of the constitu-

tion of open courts, where every man for every injury shall have remedy by due course of law. A man's rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an act of assembly. That would be a plain violation of the due course of law, a departure from the functions of legislation, and an assumption of those of jurisdiction.

It is not by its author, but by its nature, that we judge of the arbitrariness of a law. It may be arbitrary when passed as well by a democratic legislature as by a despot, though not so likely to be passed. Either may legislate in disregard of the well-settled and approved usages and customs of the people, and that is arbitrary; but that is not the kind of arbitrariness that is in question here, for arbitrariness in legislation is not always unconstitutional.

Any form of direct governmental action on private rights, which, if unusual, is dictated by no imperious public necessity, or which makes a special law for a particular person, or gives directions for the regulation and control of a particular case after it has arisen, is always arbitrary and dangerous in principle, and almost always unconstitutional. But that is not arbitrary nor unconstitutional which, within the sphere of politics, makes general laws for all cases in the class that is at the time the subject of legislation, if it be in reasonable harmony with the intelligence, usages, and customs of the people. And that is not arbitrary that decides cases according to general laws passed before the cases arise, or according to the usages and customs of the country, or in the absence or inapplicability of either of these, according to the general principles or well-settled analogies of the law.

Properly speaking, all laws are rules for classes of cases, and never for a particular case or instance. That can be only a rescript, judgment, or decree that decides a particular case, or any part of it, and it is naturally and essentially the result of judicial and not of legislative functions, and comes after and not before the case arises, and after and not before the hearing of the parties.

Legislation gives us standards of weight, measure, and value; but it weighs, measures, and values nothing. And so, with custom and usage, it gives us the rule or standard of civil conduct and civil rights; but it never judges under the rule, or applies its standards to any given case. It gives the rules and implements of justice, but uses none of them. It

hears no parties, just because it has no particular case before it. Jurisdiction is always engaged in applying the standards of right to particular cases of disputed right, and therefore always deals with parties, and therefore always hears them.

In general outline, though not always in practice, these two functions are quite as distinct as those of the abstract mathematician and of the practical surveyor or astronomer, as those of coinage and of commerce, as those of the machinist and of the operator of the machine, as those of the general terms of language and of the application of them to things, or as those of the general laws of thought and of their application in reasoning. It is practice, however, and not knowledge that is thus divided and restricted. To be truly intelligent and orderly, each department ought to understand, but not to undertake the functions of the other. In the present case, the practical distinction seems to us quite as clear as the theoretical one. We are dealing with a simple legislative decree in a particular case, involving no confusion of theory and practice, and having no shade of general rule about it, and it is plainly a departure from legislative functions.

It is argued that the legislature has entire control over the remedies of the law, and may alter them at pleasure; and that all statutes of limitation, being remedial in their nature, fall under this authority. There is general truth in this, and we need not stop to show how far its generality is to be restricted, except in its application to this case.

There is nothing plainer in the bill of rights than the principle that all men must stand on an equality before the judicial tribunals; and they do not stand so, if the judiciary is bound to admit an inequality created by a legislative decree, by which a statute of limitation, or any other element of the remedy, is set aside or altered for any particular case or person, so as to affect the right. However inexpedient any given change may be, none can complain of inequality in it, if it be made to apply to all alike. And people bear with patience even very defective laws, when they operate alike on all; because equality of administration is a large and essential element of justice.

However generous and just it would be for the parties to remedy such a misfortune as seems to have occurred in this case, it would not be so for the state to do it. It would not be generous, for it would be dealing only with other people's rights and property, and not with its own. And it would not

be just; for that legislation cannot be just that gives opposite rules for distinct cases in the same class; that excludes any case from the class to which it naturally belongs; that says to persons in general, You shall have the protection that naturally arises from lapse of time; and to some particular person, You shall not have it. This is nothing like "the due course of law."

We could never acquire the idea of justice, if there were no laws to regulate social intercourse, and if all human conduct were mere arbitrariness. Justice means treatment according to law, some law taken as a standard, and that is the most complete civil justice that is according to the best civil laws that the given society knows how to provide. And it being of the very nature of all law, physical, moral, social, and civil that it regulates facts, things, and persons by classes, that is not law-making at all, but only a command that directs a particular act to be done.

We know of no principle or law in the constitution of the legislature, or of the courts, that authorizes the issue of the command contained in this act of assembly, or that entitles the courts to obey it, and the petitioners have no remedy for their loss in this form. The decree below is very defective in form, in not dismissing the petition, which was evidently intended by the setting aside of the auditor's report. But we treat it according to the intention, hoping for more accuracy hereafter.

Decree affirmed, and petition dismissed, at the costs of the appellant.

LEGISLATURE CANNOT EXERCISE JUDICIAL POWERS: *Menges v. Dentler*, 78 Am. Dec. 616, and note citing other cases. The principal case is cited to this effect, in *Grim v. Weissenberg School District*, 57 Pa. St. 437; *Burns v. Clarion Co.*, 62 Id. 425; *Richards v. Rote*, 68 Id. 256; *Lane v. Nelson*, 79 Id. 409, 410; and see *Estate of Parker*, 8 Phila. 221. Vested rights cannot be divested by legislative acts: *Grim v. Weissenberg School District*, *supra*; *Richards v. Rote*, *supra*; *Lane v. Nelson*, *supra*; *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 123; and the legislature has no authority to give an action after the bar of the statute is complete: *Moore v. State*, 43 N. J. L. 207; *Palmer's Appeal*, 57 Pa. St. 490. The principal case is cited to the foregoing.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

TRAFFORD v. HALL.

[7 RHODE ISLAND, 104.]

STATUTORY RIGHT OF SET-OFF IS DESIGNED TO PREVENT an unnecessary multiplication of suits, and allows the defendant to oppose in the same suit his debt against the plaintiff to plaintiff's debt against him; but defendant cannot set off his debt against a stranger to the action, against plaintiff's debt against him, or litigate in plaintiff's action a claim of which plaintiff is ignorant, not being a party to it, and one of the contracting parties to which is no party to the action.

STATUTORY RIGHT OF SET-OFF ATTACHES TO CLAIMS legally transferable, only while they constitute mutual debts of the parties to the suit. The status of such claims, as mutually binding the parties in the same right and capacity at the time of action brought, determines this right; before this period the right is collateral to and not attached to them, and contingent upon their existence as mutual debts down to the period of the suit.

ASSUMPSIT by the holder of three promissory notes given by defendant, Hall, payable to and in favor of one Ridgway or order, and by him indorsed to plaintiff, Trafford, to secure a sum of money due from Ridgway to one Gregson. At the trial, Hall attempted to set off against Trafford's claim a debt due him from Ridgway for the rents of three houses and lots, claiming that as Trafford took the notes overdue, they were subject to the equity of such set-off. The court below ruled against such set-off, and Hall moves for a new trial on the ground of error. Other facts appear from the opinion.

Sheffield, for the plaintiff.

Hall and Potter, for the defendant.

By Court, AMES, C. J. The action in this case was properly brought by the plaintiff in his own name, as indorsee of the notes sued, and in discharge of his trust to Gregson, for whose security the notes were turned over to the plaintiff by Ridgway. It is the trustee's suit for the benefit of his *cestui*; the balance, it is true, to result to Ridgway, if any balance should remain after satisfying Gregson's debt. Upon what ground, then, can the defendant claim to set off a debt due to him from Ridgway against the plaintiff's notes? The statute of set-off was designed to prevent an unnecessary multiplication of suits; and so allows the defendant to oppose, in the same suit, his debt against the plaintiff to the plaintiff's debt against him. It is quite beside the intent of the statute to perpetrate the injustice of permitting the defendant to set off his debt against a stranger to the action, against the plaintiff's debt against him, or to litigate in the plaintiff's action a claim of which, not being a party to it, the plaintiff can know nothing, and one of the contracting parties to which is no party to the action. The twelfth section of chapter 185, of the Revised Statutes, expressly requires, in order to a set-off,—that the defendant's claim must be upon the plaintiff,—one, upon which the defendant can maintain an action against him in his own name and right, and that the right of set-off must be mutual. It will not be contended that the defendant can maintain an action against the plaintiff on the claim which he here offers to set off, and yet this is necessary to satisfy the requirement of the statute.

The defendant's notion is, that whilst these notes were Ridgway's, his right to set off against them the rents of his three houses and lots received by Ridgway attached to the notes as an equity; and that, inasmuch as the plaintiff took the notes from Ridgway long after their maturity, he took them subject to this equitable right. Without doubt, there are equities attached to notes which follow them into the hands of indorsees with notice, or what is the same thing, who take them when overdue; such as fraud in the procuring of them, or on the transfer of them after payment in whole or part; and if there has been an agreed set-off against a note of a claim held by the maker against the holder, the right to such set-off would thereby become attached to the note, and follow it into the hands of an indorsee with notice, or who took it when overdue.

The mere statutory right of set-off, however, attaches to claims legally transferable, only whilst they constitute mut-

ual debts of the parties to the suit; and was not designed to clog their transferability, but simply to enable such claims to be adjusted in a single action, and thus prevent an unnecessary multiplication of suits. The *status* of the claims, as mutually binding the parties in the same right and capacity at the time of action brought, determines this right; and before that period, the right is not attached to, but wholly collateral to them, and contingent for its existence upon their existence as mutual debts down to the period of suit. It is true that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defense, whether it be by common law or statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal. The line of cases which settles this is considered in application to cases like the one at bar in *Isberg v. Bowden*, 8 Ex. 851; and that case and the cases of *Burrough v. Moss*, 10 Barn. & C. 558, and *Oulds v. Harrison*, 28 Eng. L. & Eq. 524, are in point to the case before us, and seem to us to have been decided in conformity with principle.

Our own statute of set-off is, as we have seen, so carefully guarded as to exclude any other interpretation of it, when applied to cases like the one before us. The notes here sued are wholly independent of the defendant's claim for rents,—pre-existing it upwards of two years; nor, though the attention of the defendant was called at the trial to the matter, was it pretended that there had existed any agreement between Ridgway and the defendant, before the plaintiff's title to the notes accrued, that they were to be satisfied by a set-off of the rents of the Brooklyn lots received by the former. The absence of such agreement would effectually dispose of the proof offered as applicable to the plea of payment, or to the general issue; but as the allowance of the judge who presided at the trial shows, the proof was offered only under the plea of set-off, and under that plea, was, as we have considered, properly rejected by him.

We have purposely abstained from looking at the character of the claim offered to be set off, under the facts disclosed by the deed, defeasance, and receipt, which seems, principally, to have occupied the attention of the counsel, and from considering the question whether the claim was so far liquidated as to

come within the limited right of set-off prescribed by the statute. We prefer to rest our judgment upon the simple ground that the defendant cannot set off his claim against Ridgway against the plaintiff's claim against him; and dismissing this motion for a new trial, with costs, order judgment to be entered for the plaintiff in accordance with the verdict.

SET-OFF APPLIES ONLY TO MUTUAL DEBTS between plaintiff and defendant: *Anson v. Houch*, 45 Am. Dec. 133, and note 137; and such debts must exist in favor of defendant when the action is commenced: *Lee v. Lee*, 76 Id. 680, and note 684.

NEGOTIABLE INSTRUMENTS AS MATTER OF SET-OFF: See *Anson v. Houch*, 45 Am. Dec. 133, and note 137; *Goodpastor v. Voris*, 74 Id. 313.

DEBT INVOLVING ONE NOT PARTY to the suit cannot be set off: See note to *Gregg v. James*, 12 Am. Dec. 154.

HUNT v. BATES.

[7 RHODE ISLAND, 217.]

UNSATISFIED JUDGMENT IN TROVER against one of two guilty of a joint tort, is a bar to an action of trespass by the same parties against the other joint tort-feasor.

THE opinion states the facts.

Tillinghast, for the plaintiffs.

Blodgett and Eames, for the defendant.

By Court, BRAYTON, J. The defendant is sued in trespass for taking and carrying away and converting to his own use the property of the plaintiffs. The property was actually taken by one Joshua Lathrop, a deputy sheriff, upon a writ against Hunt, Farnum, & Co., wherein the now defendant was plaintiff, and his liability to this suit is claimed to arise from his command to the officer to attach the property in question. It was, at the time, the property of the plaintiffs, and not of the defendants in that writ. After the attachment, the plaintiffs prosecuted an action of trover against Lathrop for this wrongful attachment, alleging a conversion of the property to his, Lathrop's own use, and recovered judgment against him for the full value of the goods and chattels attached. Judgment, however, has not been satisfied; and the question is if, without satisfaction, it is a bar to a subsequent action for the same goods.

In cases of joint contract, the judgment alone, against one,

will bar any suit against a co-contractor, because, as it is said, the cause of action is changed into matter of a higher nature, — *transit in rem judicatam*, — and this is always the case when there is but one cause of action. In joint contracts, there can be but one cause of action; since there is but one contract, and by the suit against one it becomes merged in the judgment; and no cause remains whereon another suit will lie against any one: *Ward v. Johnson*, 13 Mass. 188; *King v. Hoare*, 13 Mees. & W. 493. On the contrary, when the contract is several, as upon a joint and several bond, the plaintiff may have his action against each of the obligors, — the liability of each being distinct from and independent of the others. In such case, the judgment against one is no bar to a suit against another, because the causes of action are distinct. The promise or obligation of each is his only. The cause of action, the promise of A, could never merge in a judgment against B, nor could it be changed into matter of a higher nature, except in a suit against A, whose promise only it is: *Crawley v. Lidgate*, Cro. Jac. 838; *Claxton v. Swift*, 3 Mod. 86; *Whiteacres v. Hamkinson*, Cro. Car. 75. The judgment in these cases must, in order to constitute a bar, be satisfied by the judgment debtor. Satisfaction of the judgment will discharge, not only that judgment, but will operate as a release of every cause of action or suit collateral to it, whether against the same defendant or any other. Judgment against a drawer is no bar as to an indorser, without satisfaction: *Claxton v. Swift*, 3 Mod. 86.

In *Broome v. Wooton*, reported in Yel. 67, S. C., Cro. Jac. 78, and Moore, 762, the suit was trover for plate; plea, former recovery of judgment against J. S. for the same plate. Though the judgment was not satisfied, it was agreed that it was a good bar. Popham, in this case, said: "If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, he shall not have a new action again for this trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference," as he says, "betwixt this case and the case of debt and obligation against two is, because there every of them is chargeable for the entire debt, and therefore a recovery against one is no bar against another till satisfaction." He here distinguishes between a tort by several and an obligation joint and several, where each is severally liable for the entire debt, and upon his several promise. The authority of this

case is impliedly recognized in *Lacon v. Barnard*, Cro. Car. 35, which was a suit in trover for certain sheep; plea, that the plaintiff had recovered judgment in an action of trespass, alleging a conversion of the same sheep, and judgment still in full force. To avoid the bar of this judgment, the plaintiff replied that the damages were only recovered for the taking and detention, and not for the conversion. It was conceded that if damages had been given for the conversion, and judgment therefor, the plaintiff would be barred; but as the judgment was not for that, the replication was sufficient.

In *Adams v. Broughton*, Andrew, 18, which was also an action of trover, the plea was a former judgment in trover against one Mason for the same goods. The court, in this case, said: "The property in the goods was altered by the judgment. The damages recovered are the price of the goods, and Mason has the same property as the plaintiff had, and this against all the world. The plaintiff cannot say the goods are his." The damages in this case were for the conversion of the goods to the use of Mason, and their entire loss to the plaintiff. This was the cause of action merged in the judgment. It was not replevin or detinue for the goods themselves, but a suit to recover their value, and assumed that they were no longer the goods of the plaintiff, but had, wrongfully, it is true, but actually by the conversion, become the goods of the defendant.

The authority of the case of *Broome v. Wooton*, Yel. 67, is recognized by Baron Parke in delivering judgment in *King v. Hoare*, 13 Mees. & W. 494. The case with which Baron Parke was dealing was one of joint contract in which the plea was by one of the debtors of a former recovery against the other for the same debt; and on page 504 he says: "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *Transit in rem judicatam*; the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true when there is but one cause of action, whether it be against a single person or many. The judgment

of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action being single, cannot afterwards be divided into two"; and referring to and commenting upon this case of *Broome v. Wooton*, Yel. 67, as one that decides that if two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause, says: "We do not think that the case of a joint contract can be distinguished, in this respect, from a joint tort. There is but one cause of action in each case." "Whether the action is brought against one or two, it is for the same cause of action." The only difference is, that if one joint debtor be sued alone, he may plead in abatement the non-joinder of his co-contractor, which a joint tort-feasor cannot do. This difference arises, not from the fact that there is more than one cause of action, but that one joint wrong-doer cannot call upon the other for contribution to the damages recovered.

In the case of *Buckland v. Johnson*, 15 Com. B. 145, S. C., 80 Eng. Com. L. 145, the goods of the plaintiff had been wrongfully converted by the defendant and his son jointly, by selling them. The proceeds of the sale were received by the defendant alone. The suit against the defendant was for the moneys received for the sale of the goods, as money had and received to the plaintiff's use, and he was also charged with converting the plaintiff's goods. The plaintiff had sued the son alone, and recovered one hundred pounds as the value of the goods converted, but had not obtained satisfaction. This matter was pleaded by the defendant, and the court adjudged it a sufficient answer. Jervis, C. J., in delivering judgment, says: "The authorities show that if the son had received this money as well as converted the goods, and Buckland had sued him in trover, and obtained judgment against him, though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. Upon the same principle, if two jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received, to recover the value of the goods, for which a judgment has already passed in the former action." He quotes and adopts the reasoning of Baron Parke, in *King v. Hoare*, 13 Mees. & W. 494, and says, in conclusion: "The right of action is merged

in the judgment. It is the judgment that disposes of the matter, and not the payment." He had before said: "The whole fallacy of the plaintiff's reasoning is his losing sight of the fact that by the judgment in the action of trover, the property in the goods was changed by relation from the time of conversion; and that consequently the goods, from that moment, became the goods of Thomas B. Johnson [the son], and when the defendant received the proceeds of the sale, he received the son's money,—the property of the goods being then in him." Maule, J., in the same case, says of the plaintiff: "Having his election to sue in trover for the value of the goods, or for the proceeds of sale as money had and received, he elected the former, and has obtained judgment. He has therefore got what the law considers equivalent to payment, viz., a judgment for the value of his goods. The circumstance that the present defendant was a joint converter, or a stranger, makes no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against anybody else. There is an end of the transaction. Having recovered a judgment, his remedy is altogether gone; his claim was satisfied as against all the world.

The learned editor of *Yelverton*, in a note to the case of *Broome v. Wooton*, Yel. 67, says, the point decided in that case has never been otherwise decided. There is no case—we find none—in which it has been expressly held that a judgment against one joint trespasser, without satisfaction, will not bar a suit against the other. There are cases where the judgment had been satisfied, in which it was held that judgment and satisfaction will bar, and where stress is laid upon the fact that the judgment was satisfied: *Morton's Case*, Cro. Eliz. 30; *Lendall v. Pinfold*, 1 Leon. 19; *Hitchcock v. Thurland*, 3 Id. 122; *Cooper v. Shepherd*, 3 Com. B. 267; S. C., 54 Eng. Com. L. 267. These cases are consistent with the case in *Yelverton*, and the doctrine announced by Baron Parke, and afterwards by Jervis, C. J. Judgment and satisfaction would bar another suit against any party jointly liable. It would also bar every concurrent remedy for the same thing, even where no joint action would lie. But this is not inconsistent with the idea that a judgment against one of two persons jointly guilty will, without payment, bar any further suit against the other. There are cases, also, in which it has been held that it cannot be pleaded in abatement by

one tort-feasor that another, jointly guilty, has not been joined as defendant: *Rawlinson v. Oriett*, Carthew, 96; Com. Dig., tit. Abatement, F, 8; and that such omission is no ground for a motion in arrest of judgment, though the omission appear by the record: *Barker v. Martyn*, Styles, 20.

There is the case of *Corbet v. Barnes*, W. Jones, 877, where several judgments were rendered against persons jointly guilty. Judgment against Hill for an assault and battery was recovered in the common bench in London, and afterwards a judgment against Corbet and two others was rendered in Hertford for the same assault. A plea in bar seems to have been interposed in the second suit. After payment of the first judgment by Hill, Corbet, being taken in execution, sought a remedy by *audita querela*, averring that the judgment against him was for the same cause of action, and the satisfaction of the judgment by him. The proceedings, to say the least of them, were anomalous. There is, first, a several suit against Hill and judgment; then three others are sued jointly, treating the cause of action as both joint and several at the same time. What would have been the judgment in the second action had it appeared by plea that judgment had already been obtained by the plaintiff for the same cause of action, is not indicated, and there is nothing to show that the rule stated by Popham, in *Broome v. Wooton*, Yel. 67, would not have been applied. That case had not been doubted or overruled. If the defendant, Corbet, had neglected to plead the prior judgment in bar, he could not avoid the second judgment from being rendered against him; and thus his only remedy was by the proceeding which he instituted, alleging the payment by Hill, upon the judgment against him for the same assault. This he might do, without impugning the doctrine announced by Popham.

Upon the authority of the preceding cases, we are obliged to say that the recovery against Lathrop is a good bar to this suit, and judgment must be for the defendant.

UNSATISFIED JUDGMENT AGAINST ONE JOINT TORT-FEASOR as a bar to an action against the other: See *White v. Philbrick*, 17 Am. Dec. 214; *Blane v. Crockeron*, 54 Id. 203, and notes to these cases discussing the question at length, and citing numerous cases. The principal case is cited with approval in *Bennett v. Fyfield*, 13 R. L. 140; but it is disapproved in *Loosejoy v. Murray*, 3 Wall. 14, the court holding that nothing short of satisfaction of a judgment in trespass will bar an action against another joint trespasser who was not a party to the first suit, and that, we believe, accords with the weight of authority upon this subject.

PHILLIPS v. POTTER.

[7 RHODE ISLAND, 282.]

FRAUD AS DEFENSE TO SUIT ON BOND. — While a party to a bond is estopped at law from showing want of consideration or a different consideration from that therein contained, or fraud in any matter collateral to the consideration, yet while the bond remains executory, and defendant specially pleads that it was procured by fraud, covin, and misrepresentation of plaintiff, setting forth wherein such fraud consists, and thus showing that it reaches to the substance of the consideration, he is not estopped from availing himself of such defense.

THE opinion contains the facts.

Eames, for the plaintiff.

Lapham and Greens, for the defendant.

By Court, **BULLOCK, J.** This is an action of debt, upon bond with condition. The breach assigned is the non-performance by the defendants of their obligation to pay fifteen hundred dollars in six months from the date of the bond. The defendants, by their third and fourth pleas, aver that this obligation was procured by the fraud, covin, and misrepresentation of the plaintiff, setting forth wherein the fraud, etc., consists. The plaintiff replies that in this action the defendants are estopped from setting up this defense; to which replication they demur. The demurrer therefore raises the question of the sufficiency of the pleas and of the replication.

It is an admitted principle that in general a party is estopped to deny that which he hath solemnly affirmed under seal. Exceptions to this general principle may be found as well established as the rule itself. Thus a trustee, after conveyance to his *cestui que trust*, is not estopped from setting up an older and after-acquired title; or a lessee from denying the title of his lessor, after the relation has ceased, or after he has been evicted by a title paramount. There is another class of cases, admitted exceptions to the rule above stated, as when the deed is fraudulently read to an illiterate person; when a false deed is substituted for the real one; or when, from the imbecility of age, the weakness of disease, or like causes, the covenantor or obligor is not legally competent to contract. These cases proceed upon the acknowledged principle that the instrument is not the deed of the party executing it; that it is a nullity; and that there is nothing by which he may be estopped. So when the consideration of a deed is illegal, the party claiming under it is not permitted to enforce it either at

law or in equity, because it contravenes good morals or sound policy. The question here is, whether, at common law, the case of actual fraud forms an exception to this general rule, that an obligor is estopped to deny his own sealed acknowledgment, as against the obligee; in other words, whether, when the party who has practiced a fraud seeks to enforce his own fraudulent contract against the party upon whom the fraud has been practiced, the party wronged can plead the fraud in bar of the action, or is estopped because the contract is under seal. That one who has practiced fraud shall not derive any advantage from it, is a rule of the common law coeval with the law itself. In the earliest of the reports may be found adjudged cases where not only bills of sale of goods and chattels, but grants and feoffments of lands, and judgments of court, are set aside upon this principle: Wood's Inst. 299, and cases there cited; 2 Roll. Abr. 23, 549; *Walrond v. Pollard*, 3 Dyer, 294 a; *Anonymous*, Id. 295 b; *Wilkes v. Morefoot*, Cro. Eliz. 86; *Houghton v. Rushby*, Skin. 257, pl. 4. These cases were ruled upon the obvious doctrine that the practice of fraud, or covin, in the procuring of a contract, was against sound morals and good conscience, and courts of law uniformly refused to lend their aid to enforce such contracts. Of the various early acts of Parliament relating to this subject, the purpose was to define a new remedy rather than to establish any new right. The leading statute of 13 Eliz., c. 5, did not import any new rule into the common law. Its object was rather to declare what the common law was, and what it had been. Lord Coke, in two different references to this statute, says: "It appeareth," by its enacting clause, "what the law was, before the making of this act": Co. Lit. 290, tit. Release, 76, tit. Escuage. "All deceitful practices in defrauding another are condemned by the common law," and this "without the express provision of any act of Parliament": 2 Bac. Abr. 594. Of the like opinion was Lord Mansfield, who, in *Cadogan v. Kennett*, Cowp. 434, says: "The rules and principles of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law would have attained every end proposed by the statutes": 13 Eliz., c. 5, and 27 Eliz., c. 4. Thus, whether the rule that fraud in the consideration of a contract vitiates it, rests upon the common law, or upon the statute, in either case it is equally affirmed.

The question whether courts exercising common-law, as con-

tradistinguished from equity, jurisdiction, take cognizance of such cases when the contract is evidenced by a sealed instrument, is one upon which the authorities are not agreed. That a party who has been defrauded usually invokes the aid of a court of equity, there is no doubt, because its course of procedure is more direct, thorough, and searching, its remedies often more effective; and because, also, it tends to limit the number of actions. These are some of the reasons assigned by Blackstone, who, so far from admitting that in cases of fraud the jurisdiction of a court of equity is exclusive, says, that every kind of fraud is equally cognizable at law, and that some frauds are only cognizable there: 3 Bla. Com. 432, 37-39; and his views are supported by the case of *Bright v. Eynon*, 1 Burr. 390, where the fraud went, it would seem, as well to the consideration as to the execution of a discharge, when Lord Mansfield distinctly laid down the principle "that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud": See also *Cockshott v. Bennett*, 2 Term Rep. 765. But the interposition of the former is often necessary, for the better investigation of truth, and to give more complete redress.

In *Hayne v. Maliby*, 3 Term Rep. 440, the question whether fraud in the consideration of a sealed instrument could be pleaded at law, in bar of the action, arose directly. The action was covenant, for using a patent otherwise than agreed. The plaintiff demurred to the pleas of the defendant, and assigned, for reasons, that the defendant was estopped by his covenant to deny that the invention was new, or that the patentee was not the inventor. But the court (Kenyon, C. J.), without dissent, ruled that when a party falsely pretends to have certain exclusive rights, which upon terms he assigns to another, who in consideration thereof enters into the covenant sued upon, the party sued is not estopped from setting up that the consideration of his covenant was fraudulent and void; that the doctrine of estoppel does not apply to the party who has been cheated and imposed upon. In this country, there has been a contrariety of decisions upon this point. A number of cases were cited, upon the argument, from the New York reports, in which the general doctrine is laid down that at law such fraud only as goes to the execution of a specialty, or to its illegality, can be set up in avoidance. An examination of the cases will show, we think, that in some of them, there was a mere failure of consideration; in others, the fraud did not

reach to the substance of the consideration, or to the essence of the contract, but only to some collateral matter. In *Belden v. Davies*, 2 Hall, 447, Oakley, J., expressly negatives the idea that fraud, as such, can be pleaded as a substantial and independent defense at law, to defeat a sealed instrument; because, he says, that when such an instrument is executed understandingly, and with a full knowledge of its import, its consideration cannot be impeached at law, except upon the ground of its illegality.

It is worthy of notice that no leading English authority is cited in aid of these decisions. They all rest upon, or at least refer to, the case of *Dorlan v. Sammis*, 2 Johns. 179, note, which was a writ of error from Queen's County, and in reference to which it has been said, the question of fraud did not arise; and this view of that case is strengthened by the fact that the court, in giving their opinion, remark that no authority can be found where a bond has been set aside at law, unless the consideration was void, or there had been fraud. In *Stevens v. Judson*, 4 Wend. 473, Savage, C. J., unwillingly defers to these decisions, and places the opinion of the court upon no other ground than that it has been so decided, and adds that he can see no reason why. The technicality of these decisions, and their tendency to multiply actions, influenced, no doubt, the legislature of that state subsequently to enact (2 R. S., p. 406, secs. 77, 78) that a seal should only be presumptive evidence of a consideration; and opening a specialty to all the defenses at law of a simple contract. In Pennsylvania, the question whether fraud, going to the substance of the consideration of a sealed instrument, can be set up in bar at law, could not, until a recent period, well arise as the subject of a distinct and independent adjudication; because, under her system of jurisprudence, the courts exercised a mixed jurisdiction, and administered justice in each case as it arose, upon the blended principles of law and equity.

This point has also been considered in the supreme court of the United States. The views of that tribunal are entitled to great weight. In the case referred to, which was that of *Hartshorn v. Day*, 19 How. 222, this question was not the material or leading question involved. Nelson, J., does say, that as a general rule, fraud in the consideration of a sealed instrument is not admissible at law to avoid the obligation; but the reason he assigns is, the greater ease with which the rights and equities of all parties can be adjusted in a court of equity;

and he indirectly limits the application of this rule to those states where the two systems prevail, assuming that such states have adopted and acted upon it as a settled rule of practice. The case at bar is also distinguishable from the case last referred to, in this, that in the latter case the contract had been in part executed.

It is unnecessary to review the decisions in Massachusetts upon this point, because it was admitted at the argument that, by repeated adjudications in that state, it had been settled that fraud and imposition in the consideration of a sealed contract might be set up as a competent defense at law. It was said, this rule had its origin there, in the fact that the courts of that state did not exercise chancery powers. But we think a better reason may be found in the fact that those courts have adhered, from the first, to the common-law principle that fraud vitiates every contract, or at least that every such contract may be avoided, as well at law as in equity, and that in cases of fraud, courts of law exercise concurrent jurisdiction with courts of equity. In the recent case of *Partridge v. Messer*, 14 Gray, 182, where the question arose at law, whether a release procured by fraud might be avoided, the court state that such an agreement cannot be set up by the party who has committed the fraud, against the party who has been defrauded. To the same effect are the cases of *Wedlake v. Sargent*, 8 Eng. L. & Eq. 404, and of *Mallalieu v. Hodgson*, 6 Q. B. 689; S. C., 71 Eng. Com. L. 689. In this last case, which was *indebitatus assumpsit*, the plea was release, and the replication that the release was obtained by fraud and covin. In *D'Aranda v. Houston*, 6 Car. & P. 511, S. C., 25 Eng. Com. L. 516, which was debt upon a bond, the plea was fraud, covin, and misrepresentation in the consideration. In *Evans v. Edmonds*, 13 Com. B. 777, S. C., 76 Eng. Com. L. 777, the action was covenant; plea, that the defendant was induced to enter into the covenant by false and fraudulent misrepresentations; and in other cases that might be cited, we see this defense interposed without objection. It is true that in *Mason v. Ditchbourne*, 1 Macl. & R. 460, and referred to in 80 Eng. Com. L. 223, Lord Abinger refused to permit it to be made, but he expressly rests the decision upon his opinion of what the law should be, rather than of what the law is. The evidence having been rejected, the defendant moved for a new trial; and the court made the rule absolute, in order that the question might be distinctly raised, when it was held that the evidence was admissible.

Admitting that the cases may not all be reconciled, the result of them, we think, is, that when a party to a sealed instrument actually executes it, and is competent to execute it, and is not deceived as to its actual contents, he cannot avoid it upon the plea of *non est factum*, because it is his deed; and while also he is estopped at law, from showing a want of consideration, or a different consideration from that actually contained in the contract, or fraud even in any matter collateral to the consideration, yet while the obligation remains executory, and the defendant specially pleads that it was procured by the fraud, covin, and misrepresentation of the plaintiff, setting forth wherein such fraud consists, and thus showing to the court that it reaches to the substance of the consideration, such a party is not, by any form of practice, or by any rules of technical law adopted or acted upon in this state, estopped from availing himself of such a defense. This conclusion does not, of necessity, involve the decision that such an obligation is void. However courts may, at different times, have been divided in opinion upon the question whether fraud, going not to the execution but to the consideration of a deed, renders it void or voidable only, they all agree in this, that as between the original parties, the party wronged may, either at law or in equity, set up the fraud, and may avoid it at his election. In such cases, therefore, the distinction is rather formal and technical than substantial or real; while in questions involving the rights of creditors and *bona fide* purchasers, the distinction becomes of primary and controlling importance.

Here, the question is not whether equity has jurisdiction, but whether its jurisdiction is exclusive. In many, perhaps in most, cases of fraud, from the nature of its jurisdiction, the the variety of its powers and remedies as well as of the processes through which its remedies are enforced, a court of equity is the most fit instrumentality to adjust the conflicting rights and equities of all parties, meting out to each his own exact measure of equity; but it does not thenceforth follow that when a party is sued at law upon an executory contract, and pleads to the action, that such contract is void, because of actual fraud in the very matter upon which his alleged promise rests, that he is estopped from so pleading, simply because the contract is under seal. It will be noticed that there is nothing inequitable in allowing this defense in the case at bar, since our refusal to enforce the payment of the two sums

of fifteen hundred dollars and of five hundred dollars will clear the condition of the bond of the only stipulation which the pleas aver, and the demurrer to them admits, was procured by fraud.

The seventh replication to the third and fourth pleas is overruled, and the demurrer of the defendant sustained.

FRAUD AS DEFENSE TO SUIT ON BOND: See *Hinton v. Williams*, 25 Am. Dec. 84, and note 95. As to fraud as a defense generally, see *Cecil's Adm'r v. Spurger*, ante, p. 149.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

GARCIA v. STATE.

[25 TEXAS, 209.]

TAKING PROPERTY WITHOUT CONSENT OF OWNER is an essential ingredient of theft; unless this is proved, it cannot be inferred that larceny has been committed.

POSSESSION OF PROPERTY IS PRESUMPTIVE EVIDENCE of the guilt of the possessor, especially if held soon after the commission of the theft. But the mere possession of property is not evidence of its caption and asportation without the owner's consent.

ONUS OF PROVING TRUTH OF HIS EXPLANATION is upon party in whose possession stolen property is found, when his account, explanatory of such possession, is unreasonable or improbable; but as a general principle, it devolves upon the state to show the falsity of such explanation when it is natural and probable, and satisfactorily accounts for such possession.

VERDICT WHOLLY UNSUPPORTED BY EVIDENCE in an essential particular is ground for a new trial.

PROSECUTION MUST IDENTIFY STOLEN PROPERTY found in the possession of the accused, with that for the theft of which he is indicted, and this must be done by the most direct and positive testimony of which the case is susceptible.

INDICTMENT UNDER ARTICLE 765, PENAL CODE of TEXAS, charging theft, must allege the possession from which the stolen property was taken.

INDICTMENT against Garcia and one Deal for the theft of two mules, the property of one Rowlett. The opinion states the facts.

N. G. Shelley, attorney-general, for the appellee.

By Court, MOORE, J. The taking of the property without the consent of the owner is an essential ingredient of the offense for which the appellant is indicted. And unless this

is proved, we cannot infer that any offense has been committed. Possession of stolen property, especially if recently after the commission of the theft, has always been regarded as presumptive evidence of the guilt of the possessor. But it has never been held that the mere possession of property is evidence of its caption and asportation without the owner's consent. Although the agent of the owner was examined as a witness, it does not appear from the record that there was even an effort made by the state to prove that the mules, alleged to have been stolen, were taken without his or the owner's consent. The verdict is, consequently, in this essential particular, wholly unsupported by the evidence, and the motion for a new trial should have been granted by the court.

When the account given by a party in whose possession stolen property is found, explanatory of his possession of it, is unreasonable or improbable, the *onus* of proving its truth lies on him; but if it is natural and probable, and satisfactorily accounts for his possession of the property, as a general principle, it devolves upon the state to show that it is false: *Regina v. Crowhurst*, 1 Car. & K. 370; S. C., 47 Eng. Com. L. 370. The statement made in the presence of the appellant by Deal, who assumed the entire guilt, if any offense had been committed, seems to be a reasonable and satisfactory explanation of the appellant's connection with, and apparent joint possession of, the property; and was sufficient, unless in some manner rebutted by the state to have exonerated him from the presumption of guilt arising from his presence with it.

It was also incumbent upon the state to identify the property found in the possession of the appellant with that for the theft of which he was indicted. And this, it would appear from the case of *Commonwealth v. Kinison*, 4 Mass. 646, must be done by the most direct and positive testimony of which the case is susceptible. The only evidence on this point before the jury was the description of the size and color of the mules by the different witnesses; and that the mules described in the indictment were received by the sheriff from parties who were present when those found in appellant's possession were delivered into the hands of the justice of the peace; and that those parties, at the same time, placed the appellant in the custody of the sheriff, together with the *mittimus* from the justice committing him to answer for the offense for which he was subsequently indicted. This, to say the least of it, is a much more unsatisfactory character of testi-

mony than the direct and positive proof which might, it is evident in this case, have been adduced. But as the evidence tended so support the verdict, and the case must be reversed on other grounds, we deem it unnecessary to determine whether the failure of the state to identify the property by more direct and positive testimony would be, of itself, a sufficient cause for the reversal of the judgment.

Article 765 of the penal code makes the stealing of one of the domestic animals enumerated in it a distinct offense from theft in general, as defined by the previous articles. But in this article of the code there is no definition of the offense inhibited by it; and to ascertain this we have to look to the definition of theft as given in the preceding articles; and there we find that the allegation of the possession from which the stolen property was taken is made by the definition of the offense a necessary ingredient in its description. This allegation is omitted in the indictment in this case; it is therefore defective, and the motion in arrest of judgment should have been sustained.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

LARCENY, WHAT CONSTITUTES. — It must be a felonious taking without the owner's consent: *State v. South*, 75 Am. Dec. 250, and note 253; *Robinson v. State*, 78 Id. 487; see also *State v. Humphrey*, Id. 606, and notes to these cases. An indictment is fatally defective which does not charge that the stolen property was taken without the consent of the owner: *Johnson v. State*, 39 Tex. 204, citing the principal case.

POSSESSION OF STOLEN PROPERTY shortly after its loss by the owner is presumptive evidence of guilt which may be explained, but if the accused fails to give a satisfactory explanation as to his possession, the presumption will warrant a conviction: *Belote v. State*, 72 Am. Dec. 163, and note 169.

WHEN REASONABLE ACCOUNT IS GIVEN of the possession of goods recently stolen, it is incumbent on the prosecution to show that such account is false: *Jones v. State*, 64 Am. Dec. 175. The principal case is cited in *Fisher v. State*, 4 Tex. App. 184, to the points contained in the third paragraph of *syllabus supra*.

NEW TRIAL WILL BE GRANTED if material allegations are not proved: *Ryan v. Copes*, 73 Am. Dec. 106.

INDICTMENT WHICH DOES NOT ALLEGE from whose possession the stolen property is taken, is fatally defective under the Texas statute: *Thomas v. State*, 1 Tex. App. 296; *Watts v. State*, 6 Id. 264; *Cass v. State*, 12 Id. 229, all citing the principal case.

IF PROSECUTION PUTS IN EVIDENCE declarations made by the accused, they are bound by them unless they are proved to be false: *Gardiner v. State*, 23 Tex. 696, citing the principal case.

STATEMENT MADE IN PRESENCE OF PRISONER by one who assumes the entire guilt is a satisfactory explanation of the connection of the accused with the joint possession of the stolen property, and unless rebutted by the prosecution, is sufficient to exonerate him from the presumption of guilt: *Wright v. State*, 10 Tex. App. 478; *Windham v. State*, 19 Id. 423, both citing the principal case.

STATEMENT OF ACCUSED WITH RESPECT TO HIS RIGHT TO PROPERTY when first found in the possession of stolen property, and explanatory of such possession, if probable and reasonable casts the *onus* on the prosecution to prove its falsity: *Miller v. State*, 18 Tex. App. 38; *Johnson v. State*, 12 Id. 391, both citing the principal case.

ALLEGATION IN INDICTMENT THAT STOLEN PROPERTY was taken without the owner's consent must be proved, it cannot be inferred or presumed; it may, however, be proved by circumstantial evidence: *Wilson v. State*, 12 Tex. App. 487, citing the principal case.

BLANKENSHIP v. DOUGLAS.

[25 TEXAS, 225.]

JUDGMENT LIEN ON LAND OF DEBTOR is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment; and equity will protect the equitable rights of third persons against the legal lien, and will limit such lien to the actual interest which the judgment debtor has in the estate. This rule is qualified by the registration laws of particular states.

RESULTING TRUST IS BEYOND CONTEMPLATION of Texas statute respecting the rights of creditors, and is protected against one who acquires a judgment lien against it without notice, although a purchaser in good faith, for a valuable consideration, and without notice, would take the estate discharged of the trust.

PURCHASER AT SHERIFF'S SALE, without notice of prior equities, takes the land discharged therefrom.

COURT IS NOT BOUND TO GIVE INSTRUCTION, where the effect of it would, perhaps, be to cause the jury to attach too great importance to evidence too meager to sustain a verdict upon the principle involved in the instruction.

POSSESSION, TO BE EQUIVALENT TO REGISTRATION, or to amount to actual notice, or reasonable information of the claim of the party in possession, must be open and visible, or at least must not be of such character as is calculated to deceive the public.

THE opinion contains the facts.

McCall and Alexander, and Goode, for the appellant.

Herring, for the appellees.

By Court, BELL, J. This suit was instituted by the appellees to recover from the appellant and others a certain lot of ground, with the improvements thereon, in the town of Waco.

It appears from the transcript of the record, that at the fall term, A. D. 1856, of the district court for McLennan County, one James H. Mullins recovered a judgment for the sum of \$327.50, besides interest and costs, against John J. Blankenship, who was a defendant in this present suit, in the court below. Execution issued on this judgment on the fifteenth day of December, A. D. 1856; which execution was levied on the lot in controversy on the thirteenth day of January, A. D. 1857, and the lot was sold on the third day of March, A. D. 1857, when Mullins became the purchaser. The appellees, Douglas and Herring, purchased from Mullins in the month of September, A. D. 1857. It also appears that John J. Blankenship executed a deed for the lot in controversy to David Blankenship, the appellant, on the seventh day of November, A. D. 1856, which appears to have been previous to the rendition of the judgment in favor of Mullins against John J. Blankenship.

This deed from J. J. Blankenship to the appellant was proven for registration by one of the subscribing witnesses, on the seventh day of January, A. D. 1857 (which was previous to the levy of Mullins's execution), and was recorded on the 16th of January, A. D. 1857. It is also shown that the lot of land in question was conveyed to John J. Blankenship by one J. W. McCown on the twelfth day of March, A. D. 1856; and there was some evidence to the effect that the lot and the improvements thereon were purchased from McCown by John J. Blankenship for the appellant, David Blankenship, with the property and funds of David Blankenship, although the deed from McCown was executed to John J. Blankenship. The building upon the lot in controversy was occupied by John J. Blankenship for the usual purposes of merchandising, until about the time of the rendition of the judgment in favor of Mullins, when he sold his stock of goods to another person; and there was some slight evidence of acts of ownership over the property by the appellant while it was in the possession of John J. Blankenship. This evidence was introduced, of course, for the purpose of showing a possession by David Blankenship, which would amount to "reasonable information" to Mullins of his (David Blankenship's) claim to the property.

In this aspect of the case, the judge below instructed the jury as follows: "If you believe from the testimony that the judgment rendered in favor of Mullins against John J. Blank-

enship was rendered before the deed from John Blankenship to David Blankenship was recorded, the judgment was a lien on the land in controversy, and the sheriff's sale under it passed the title." The present appellant seems to have relied in the court below both upon his unregistered deed of the 7th of November, A. D. 1856, and such possession as amounted to "reasonable information" of his claim, and also upon his equity growing out of the original purchase from McCown, which he tried to show was made for him, and with his property and funds. In support of this latter view, his counsel asked the court to instruct the jury in the following terms: "If the jury believe from the testimony that David Blankenship furnished the money which was to pay for this property, the deed being taken in the name of John Blankenship, his son, raises the presumption that the father intended it as an advancement or gift to John J. Blankenship. But the jury will take into consideration all the testimony with regard to what the intention of the parties was at the time, and if they believe from this testimony that at the time of the trade [meaning J. J. Blankenship's trade with McCown], and not at a subsequent time, the Blankenships both intended that the house was to be really the property of David Blankenship, and not the property of John, they will consider John J. Blankenship a trustee for the father, to the extent of the money paid; and if this be so, John J. Blankenship had the right, upon this consideration, to convey to David Blankenship a good title to the land, unless the jury can find from the evidence that this deed was made subsequent to the judgment being rendered in favor of Mullins. The execution of the deed from J. J. Blankenship to David Blankenship does not operate in this case as an estoppel upon the rights of David Blankenship springing from the resulting trust in his favor, if there was any such resulting trust." There was verdict and judgment for the plaintiffs below, and a motion for a new trial, which was overruled.

The instruction asked by the counsel for the present appellant on the trial of the case in the court below, was not, perhaps, drawn with the most perfect accuracy, in view of the law; but it was sufficiently accurate to bring distinctly to the view of the court the proposition that there was an equity in David Blankenship growing out of the circumstances of the original purchase from McCown by John J. Blankenship, which equity was entitled to protection against the lien of the

judgment recovered by Mullins. And we are of opinion that the court below, by the instruction given, confined the jury to a view of the case altogether too narrow. It seems to be well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment. And courts of equity, it is said, will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate: *Keirsted v. Avery*, 4 Paige Ch. 14, 15, and cases cited. This doctrine is qualified by the registration laws of particular states, prescribing the effect of unrecorded conveyances and mortgages upon the rights of purchasers and creditors. And although in the present instance the lien of the judgment recovered by Mullins would prevail over the unregistered deed executed by J. J. Blankenship to David Blankenship on the 7th of November, 1856, unless it were shown that Mullins had "actual notice or reasonable information" of said deed, this is so only by virtue of our statute of the 5th of February, A. D. 1841: *Oldham and White*, art. 1731. If the property in controversy was purchased by John J. Blankenship with the funds of David Blankenship, and for him, then the equitable estate in the land was in David Blankenship, and upon proof of the facts, the land might have been sold under execution for the debts of David Blankenship, and the purchaser could have maintained his action against John J. Blankenship to compel a conveyance of the legal title. This kind of an equity is beyond the contemplation of our statute of registration respecting the rights of creditors. It is true that a purchaser of the estate, under these circumstances, from John J. Blankenship, in good faith, that is to say, without notice and for a valuable consideration, would take the estate discharged of the equity of David Blankenship. But it is settled that one who acquires a judgment lien, although without notice, is not to be regarded in the light of a purchaser and entitled to a preference over prior equities: See *Hare and Wallace's Notes to 2 Lead. Cas. Eq.*, pt. 1, p. 75, and the cases there cited. It is proper here to call attention to the fact that at the time of the sheriff's sale on the 3d of March, 1857, David Blankenship's deed was recorded; and it appears from the record that Mullins must have also had actual notice of David Blankenship's claim at the time he purchased. This is remarked, because, if the

sheriff's sale had been consummated without any notice to Mullins of the equity of David Blankenship, he then, perhaps, would have occupied the position of an ordinary purchaser, and might have taken the land discharged of every claim, whether arising under an unregistered deed or a mere equity; though upon this point it is not intended to express any authoritative opinion.

These views lead us to the conclusion that the court below erred in not causing the jury to inquire into the equity of David Blankenship, growing out of the original purchase from McCown, under proper instructions.

If David Blankenship's claim had rested solely upon his unregistered deed of the 7th of November, we could not perhaps have held that the court below erred, in view of the evidence in this case, in refusing to give the instruction asked by the counsel for David Blankenship, to the effect that possession in person or by tenant is equivalent to registration, etc. The court is not bound to give an instruction where, as in this case, the effect of it would perhaps be to cause the jury to attach too great importance to evidence too meager to sustain a verdict upon the principle involved in the instruction. Possession, to be equivalent to registration, or in other words, to amount to actual notice or reasonable information of the claim of the party in possession, must be open and visible, or at the least, must not be of such a character as is calculated to deceive the public.

The judgment of the court below is reversed, and the cause remanded for further inquiry into the facts, under instructions in conformity with this opinion.

Reversed and remanded.

JUDGMENT LIEN IS SUBJECT TO ALL EQUITIES existing in favor of third persons as to the debtor's lands at the time the judgment was rendered: *Beechan v. Sumner*, 47 Am. Dec. 305, and note 319; *Matter of Howe*, 19 Id. 305, and note 399. The principal case is cited to the above point, in *Oberthier v. Stroud*, 33 Tex. 524; *Orme v. Roberts*, Id. 772; *Grace v. Wade*, 45 Id. 525, 532; *Fraser v. Thatcher*, 49 Id. 80; *Stroud v. Oberthier*, 35 Id. 178; *Jamison v. Halbert*, 47 Id. 189.

BONA FIDE PURCHASER WITHOUT NOTICE OF TRUST, for valuable consideration, is protected in equity even against the *cestui que trust*: *Wyes v. Dandridge*, 72 Am. Dec. 149, and note 152. The principal case is cited in *Price v. Cole*, 35 Tex. 471, to the point that an innocent purchaser without notice will be protected. But if he has notice on the day of the sale and before it takes place, he will take the land subject to a mortgage lien which exists against it.

RESULTING TRUSTS ARE NOT SUBJECT to the registration laws of Texas, and the rights of parties must be determined by the application of the general principles of equity: *Parker v. Coop*, 60 Tex. 116, 117. Such trust will be protected against the lien of a judgment creditor, or his assignees, without notice of the trust: *Orme v. Roberts*, 33 Id. 772, both citing the principal case.

BONA FIDE PURCHASER AT EXECUTION SALE, without notice of prior equities, takes what title: See *Halley v. Oldham*, 41 Am. Dec. 262, and note 268; *Smith v. Painter*, 9 Id. 344. As to how far purchaser is protected by registration laws, see *Heister v. Fortner*, 4 Id. 417; *Jackson v. Town*, 15 Id. 405; *Hosier v. Hall*, 54 Id. 460, and notes to these cases. A purchaser without notice, and for value, takes the estate discharged of prior equities existing against it: *Senter & Co. v. Lambeth*, 59 Tex. 263; *Simpson v. Chapman*, 45 Id. 565. But if he has notice, he takes subject to such equities, and acquires only such rights as the execution defendant possessed: *Orme v. Roberts*, 33 Id. 772, all citing the principal case. That it is a general rule that a purchaser at execution sale takes only such title as the execution debtor had, see *Gumgrich v. Fols*, 57 Am. Dec. 631, and note 634; *Polk v. Gallant*, 34 Id. 410, and note 413. A judgment lien will prevail against an unregistered deed from the judgment debtor, such lien being obtained without notice: *Grace v. Wade*, 45 Tex. 528; *Calvert v. Roche*, 59 Id. 465. But in such case where one claims an equitable estate in the land, not within the contemplation of the registry laws, his estate is not within the lien of the judgment: *Grace v. Ward*, *supra*. And where the judgment creditor holds the legal title under an unregistered trust, an execution purchaser, with notice of such trust, gets no title: *Calvert v. Roche*, *supra*, all citing the principal case.

MORTGAGEE WITH CONSTRUCTIVE NOTICE of a former lien on the land takes title subject to such lien: *Delephine v. Campbell*, 52 Tex. 12, citing the principal case.

CREDITOR WHO ATTACHES LAND to which, in fact, the debtor has no title or interest, except as trustee, acquires no lien, unless by virtue of the registry laws: *Catlin v. Bonnett*, 47 Tex. 170, citing the principal case.

COURT IS NOT BOUND TO GIVE INSTRUCTION when no sufficient evidence has been introduced to warrant a finding by the jury: *Pemobscot R. R. Co. v. White*, 66 Am. Dec. 257; see also *Crommelin v. Thies*, 70 Id. 499, and note 505; *Brown v. Illius*, 71 Id. 49; *Chicago R. R. Co. v. George*, Id. 239; *Abbott v. Gatch*, Id. 635; *Andre v. Bodman*, Id. 628, and notes to these cases.

POSSESSION UNDER UNRECORDED DEED, when amounts to notice: See *Hunter v. Watson*, 73 Am. Dec. 543; *Morrison v. Kelly*, 74 Id. 109; *Bentley v. Butler*, 64 Id. 234, and notes to these cases.

JAMES v. JACQUES.

[36 TEXAS, 320.]

PURCHASER AT EXECUTION SALE OF LAND held under a trust deed containing a stipulation that ten days' notice of sale should be given, becomes the owner of the equity of redemption, and possessed of the same rights that the maker of the trust deed retained at the time of its execution. He becomes the owner of the land subject to the lien of the debt due on the trust deed, and if the required notice of sale is given he has a right

to redeem at any time before the sale. If notice of sale is waived by the parties to the trust deed, and a sale made immediately, he cannot be thereby defeated of his right to redeem.

SURETY ON NOTE SECURED BY TRUST DEED, by paying off the debt thus secured, becomes substituted to the rights of the creditor under the trust deed, and may enforce the lien for reimbursement, but not in such manner as to affect the rights to redeem of one who purchases the land at execution sale.

WHELEN WIFE BECOMES SURETY FOR HER HUSBAND on a note secured by trust deed, by which the community property and her separate property are pledged for the payment of the debt, a purchaser at execution sale of the land cannot have the respective liens so adjusted as to apply the community property to the payment of the judgment under which he purchased, and the separate property of the wife to the payment of the creditor's lien secured by the trust deed. In such case the separate property is not liable for the judgment lien, but is liable for the creditor's lien after the community property is exhausted, and all that the execution purchaser can claim is the excess of the value of the community property over the creditor's lien.

SUIT against Catharine Jacques, W. B. Jacques, her husband, Laura Sheahan, widow of John Sheahan, to subject certain separate property of Mrs. Sheahan to the payment of a deed of trust, which, together with notes with the above-named parties as sureties, was executed to one Vance to secure the payment of borrowed money. The deed of trust conveyed community property of Sheahan and wife, and also an adjoining lot, the separate property of the wife. The deed of trust also provided that, upon the maturity of the debt, the land therein mentioned should be sold, ten days' notice of such sale being given. Three days subsequent to the making of the deed of trust, one Belger brought suit against Sheahan, and levied an attachment on the community property of Sheahan and wife. Belger obtained judgment, levied execution, and the lots were sold to James, the appellant. On the same day that the above-mentioned execution was issued, the parties to the trust deed agreed in writing that the property therein mentioned should be sold without any notice of such sale being given, and on the day of the sale Catharine Jacques obtained an assignment of the trust deed and notes, to herself, from Vance. At such sale she became the purchaser of the lots and satisfied the deed to Vance, whereupon she received a deed to the property sold, and a written ratification of the sale from Sheahan and wife. At the sale above mentioned, the separate property of Mrs. Sheahan, included in the trust deed, was not offered for sale, and appellant claims that this property should have been first sold, and the proceeds applied to the extinguish-

ment of the debt secured by the deed of trust, leaving the community property of Sheahan and wife to satisfy the judgment obtained by Belger.

Denison and Henson, for the appellant.

I. A. and G. W. Paschal, for the appellees.

By Court, *BELL, J.* We are of opinion that the case made by the pleadings and evidence was not sufficiently presented to the consideration of the jury by the instructions given them; and also that the last instruction given to the jury was erroneous. It is not enough to say that Belger is not a party to this suit, and that no one is entitled to complain that notice of the sale under the deed of trust was not given. The stipulation in the trust deed that ten days' notice of sale under it should be given, was a stipulation in favor of the makers of the deed, and was intended to secure a fair competition at the sale. James, by virtue of his purchase at the sheriff's sale, became the owner of the equity of redemption, and possessed the same rights that the makers of the trust deed retained at the time of its execution. By his purchase, James became the owner of the property, subject to the lien of Vance growing out of the trust deed. It cannot be doubted that if notice of the sale had been given, and James had attended the place of sale, he would have been entitled to redeem the property by paying the debt due to Vance; and the sale could not have proceeded in the face of an offer by James to redeem. We are of opinion that Mrs. Jacques, by paying the debt to Vance, became substituted to all his rights as creditor under the trust deed, and was entitled to enforce the lien upon the lots for her reimbursement, but not in such manner as to affect James's equity of redemption.

The true controversy here is between James and Mrs. Sheahan; and we are of opinion that James cannot claim the right to have the respective liens so adjusted as to subject the lots which were community property to the Belger judgment, and the piece of land called the Rincon, which is Mrs. Sheahan's separate property, to the lien of the deed of trust, or to the payment of the debt to Vance. Mrs. Sheahan is shown to be a surety for her husband in the note to Vance. Her separate property is in no way liable to the judgment in favor of Belger. It is true, her separate property is liable to the debt of Vance, but only in connection with community property, which ought first to be exhausted. In this state of case, to adjust

the liens of Vance and Belger in such a way as to make the separate property of Mrs. Sheahan liable to the whole of the Vance debt, is to deprive her of a right, viz., to have the community property first made subject to that debt; and would be the same thing in the end as to make her separate property liable to the judgment of Belger.

All that James can claim is the excess of the value of the lots over the debt to Vance, and this much he can claim, because he has the equity of redemption.

The lots ought to have been sold by the trustee, or by some one properly substituted by him, or by the makers of the trust deed, with his consent, after the notice stipulated for in the deed, so that James might have had an opportunity to redeem. That this may be done, the judgment is reversed, and the cause remanded.

If it could be shown that the property was, at the time of the purchase by James, of greater value than the amount of the debt to Vance, and that by reason of the accumulation of interest on that debt, and the depreciation in value of the property, it was not now of value sufficient to pay the Vance debt, such facts might give rise to equities, or might affect the rights of parties; but we cannot discuss such possibilities at the present time.

Reversed and remanded.

PURCHASER AT EXECUTION SALE SUCCEEDS TO TITLE OF JUDGMENT DEBTOR: See *Stump v. Henry*, 61 Am. Dec. 300; *Lyster v. Wheeler*, 53 Id. 414; *Campbell v. Lowe*, 66 Id. 339, and note 344.

SURETY PAYING DEBT OF PRINCIPAL is entitled to be subrogated to the creditor's rights and securities: *Mitchell v. De Witt*, 78 Am. Dec. 561, and note 564.

MARRIED WOMAN'S CONTRACTS OF SURETYSHIP, whether enforceable against her separate estate: See *Willard v. Eastman*, 77 Am. Dec. 366, and note 372; *Yale v. Dederer*, 78 Id. 216, and note 226.

THE PRINCIPAL CASE IS CITED in *Preston v. Breedlove*, 45 Tex. 51, to sustain the proposition that "a party in possession, claiming under complete and recorded conveyances, is not affected by a decree of foreclosure against a remote vendor alone; and a sale under such a decree would be ineffectual to pass the title, at all events, so as to cut off his defenses against the lien."

ARNOLD v. JONES.

[25 TEXAS, 325.]

RULE THAT COMMON CARRIERS ARE ANSWERABLE for all losses not occasioned by the act of God or the public enemies, is founded in justice and sound policy and should not be departed from.

COMMON CARRIERS ARE LIABLE although they act with caution and prudence unless the loss was occasioned by the act of God, or might not have been prevented by any possible degree of caution and effort.

PAROL EVIDENCE IS INADMISSIBLE to vary or contradict the terms of a written contract.

THE opinion sufficiently states the facts.

Nowlin and Herring, for the appellant,

J. Craik, for the appellee.

By Court, BELL, J. We are of the opinion that there is no error in the judgment. The main question upon the trial below was, whether the appellants were common carriers or not. This question was fairly submitted by the court to the jury, under proper instructions concerning the liability of common carriers. There is a great diversity of decision upon questions arising upon this interesting branch of the law, and courts have sometimes been found willing to strain principles for the sake of attaining what has been thought to be the justice of the particular case. But the old rule that the common carrier is answerable for all losses which are not occasioned by the act of God and public enemies, is founded alike in justice and in sound policy, and ought never to be departed from. Chancellor Kent expresses his admiration of "the steady and firm support which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject, without bending to popular sympathies, or yielding to the hardships of a particular case." In the present case, although it is shown that the carriers acted with caution and prudence, it cannot be said that the loss was occasioned by the act of God, or that it might not have been prevented by some possible degree of caution and effort.

We think there was no error in rejecting the testimony of the witness Oakes. It was not offered upon the general question whether the defendants below were common carriers or not; but it was evidently intended to contradict or vary the written contract entered into by the parties. The rule of evi-

dence which required the court to reject such testimony is too familiar for discussion or remark.

The judgment of the court below is affirmed.

Judgment affirmed.

COMMON CARRIERS ARE INSURERS AGAINST ALL LOSSES except those occasioned by the act of God or public enemies: *Welch v. Pittsburg etc. R. R. Co.*, 75 Am. Dec. 490, and note 497; or the concurring negligence of the complainant: *Powell v. Penn. R. R. Co.*, Id. 564; or by accidental and uncontrollable events: *Cramwell v. Ship Foodick*, 77 Id. 190.

PAROL EVIDENCE IS INADMISSIBLE to vary or contradict writings: *Casper v. Berry*, 68 Am. Dec. 468; *Priddle v. Kent*, 71 Id. 327; *Henry v. Henry*, Id. 354, and notes to these cases.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

WILLIS v. FREEMAN.

[85 VERMONT, 44.]

LAND PAID FOR WITH PARTNERSHIP FUNDS, AND USED AND OCCUPIED FOR PARTNERSHIP PURPOSES, will be regarded as partnership property, even in a controversy between partnership and private creditors for priority.

CREDITOR OF ONE MEMBER OF PARTNERSHIP cannot have his debt satisfied out of his creditor's interest in the partnership funds, unless sufficient assets remain to pay all the firm creditors. If the partnership is insolvent, the firm creditors have a right to have all the property applied to the payment of their debts.

CREDITOR OF MEMBER OF FIRM, WHICH AFTERWARDS BECOMES INSOLVENT, who has attached his debtor's interest in some partnership property, prior to such insolvency, cannot have his lien divested by it. This is so, although judgment was not rendered until after the insolvency.

BILL in chancery. The opinion states the facts.

Benton and Ray, for the orator.

By Court, **POLAND, C. J.** Abbott and Lindsay were partners in the business of hotel-keeping, staging, keeping livery-stable, etc., at Lancaster, New Hampshire, from 1850 to 1859.

On the twenty-seventh day of September, 1858, they purchased a farm, partly in Guildhall, and partly in Lunenburg, Vermont, for the price of five hundred dollars, and took a conveyance of the same to themselves jointly, but they were not described in the deed as partners. But from the evidence in the case we are satisfied that the land was paid for with company funds, and was occupied and used for the partnership benefit, so that the same was really partnership property,

and should be so regarded, even in a controversy between partnership and private creditors for priority.

The defendant, Freeman, a private creditor of Lindsay, on the 30th of December, 1857, commenced a suit upon his debt, and attached an undivided half of said land, as the property of Lindsay. He recovered judgment against Lindsay at the September term of the Essex County court, 1858, and on the twenty-eighth day of December, 1858, duly set off one undivided half of said farm in part satisfaction of his execution. The orator's intestate was a creditor of the firm, and commenced a suit on his debt, and attached said farm on the 6th of September, 1858, as the property of the firm.

The orator's intestate recovered a judgment, at the September term of the Essex County court, 1858, took out his execution, and on the eleventh day of November, 1858, caused a set-off of said farm to be made to satisfy his execution.

Abbott and Lindsay failed in the fall of 1858, but the case furnishes no evidence but that when the defendant Freeman made his attachment in 1857, they were entirely solvent.

Various other matters have been introduced in evidence, but as the decision of the case does not make them material, the above statement is sufficient. The orator's bill is brought for the purpose of enjoining the defendant, Freeman, from taking possession of the one undivided half of the farm set off on his execution, and from setting up any title under his levy, as against the orator.

It is now well settled that a creditor of one member of a partnership cannot take the interest of such partner in any article of the partnership property, unless enough is left to satisfy the creditors of the firm, and if the partnership be insolvent, the partnership creditors have the right to have the partnership property applied to the payment of their debts.

The right of the defendant, Freeman, must be determined by the state of things in 1857, when he made his attachment. There is no evidence but that, at that time, Abbott and Lindsay had ample property aside from this farm to pay all their firm debts. The defendant had, therefore, a right to attach the interest of Lindsay in the farm, and appropriate it to the payment of his debt, and having thus rightfully acquired a lien upon the land by his attachment, it could not be divested by the subsequent insolvency of the partnership.

This principle seems to be settled in the following cases: *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Russ v. Fay*, 29

Id. 381. Upon this ground, we all agree that the decree of the chancellor dismissing the orator's bill must be affirmed.

REAL ESTATE OF PARTNERSHIP, NOW HELD: See *Dillon v. Brown*, 71 Am. Dec. 700; *Williams v. Love*, 73 Id. 191, and note.

CREDITORS OF FIRM ARE ENTITLED TO BE FIRST SATISFIED FROM PARTNERSHIP FUNDS, and the separate creditors from the individual funds; but this rule is applied only where there is a deficiency in one of the funds. Absolute insolvency is not, however, required, for if a firm is barely solvent and no more, having just sufficient to pay its creditors, the creditors of individual partners cannot come in. And so it will be of the separate fund: *Husband v. Owen*, 74 Am. Dec. 283, and note collecting prior cases.

TRACY v. ATHERTON.

[IN VERMONT, 32.]

RIGHT OF WAY FROM NECESSITY, STRICTLY SPEAKING, DOES NOT EXIST. A way of necessity, such as the law recognises, results either from a grant or reservation implied from the existing necessity; and unity of possession at some former time appears to be the foundation of the right.

ACTION of trespass *quare clausum*. Defendant pleaded that it was impossible for him to reach the highway without passing over the plaintiff's close in the manner charged. He made no averment of any former unity of ownership or possession of said closes. The court adjudged the plea sufficient on demurrer.

Bennett, for the plaintiff.

Edmunds, for the defendants.

By Court, BARRETT, J. The plea justifies the alleged trespass, on the ground of a right in the defendants of a way of necessity, a right created by the necessity, and in no manner derived from grant, reservation, or prescription. The cases are numerous in which a way of necessity, as it is called, has been upheld; but in most instances, it has been on the ground of a grant or reservation implied from the necessity. There are some cases in which the reason assigned for the decision seems to favor the idea that a right of way may be created by the necessity, irrespective and independent of any grant or reservation, either express or implied. The one most directly to this effect is *Dutton v. Tayler*, 2 Lutw. 1487. That case, in its facts, falls within the principle announced by the court in deciding *Clark v. Cogge*, Cro. Jac. 170, viz.: "If a man hath

four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet shall he have it, as reserved unto him by the law." The case of *Chichester v. Lethbridge*, Willes, 71, cited by counsel for the defendants, does not sustain the doctrine involved in the reason assigned for the decision in *Dutton v. Tayler*, 2 Lutw. 1487, viz., "that the public good required that the land should not be unoccupied." It was, under the second count which alone was sustained, a case of prescription, in which the necessity was needlessly alleged as showing the origin of the user that had ripened into a right by prescription.

The case of *Clark v. Cogge*, Cro. Jac. 170, which was also cited by the defendants' counsel, was the ordinary one of an implied grant of a way. *Howton v. Frearson*, 8 Term Rep. 50, was put on the same ground by Lord Kenyon, though counsel urged the right upon the principle and authority of *Dutton v. Tayler*, 2 Lutw. 1487. The ground on which the decision in *Howton v. Frearson*, *supra*, was put, in connection with the remarks of Lord Kenyon, casts a cloud upon the soundness if not upon the authority of the decision, for the reason assigned in *Dutton v. Tayler*, 2 Lutw. 1487. He says: "Even upon the general ground, I was prepared to submit to the express authority of the case in Lutwich, though I cannot say that my reason has been convinced by it. There are great difficulties in the question; but in the other mode of considering the case [viz., as an implied grant], those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted, even by the plaintiff."

In 1 Saund. 323 a, note 6, the cases are collated, and the doctrine educed is, that a way of necessity, such as the law recognizes, results either from a grant or reservation implied from the existing necessity, and that unity of possession at some former time appears to be the foundation of the right.

In *Bullard v. Harrison*, 4 Maule & S. 387, the third plea was, in substance, the same as the one now under consideration; and after full argument, Lord Ellenborough, with some spirit and great point, says: "Then as to this being well pleaded as a way of necessity, it is pleaded without showing any unity of possession or prescription whereby the land over which the way is claimed became chargeable. . . . It seems to suppose that whenever a man has not another way, he has a right to go over his neighbor's close. But this is not so," etc. He

then refers to note 6 in 1 Saund. 323 a, as containing the law of the subject, and manner of pleading a way of necessity, very accurately detailed, and saying "it is a thing of grant," etc.

In *Proctor v. Hodgson*, 29 Eng. L. & Eq. 453, in the court of exchequer, the subject is involved and discussed; and the doctrine in the note on 1 Saund. 323 a, and as held by Lord Ellenborough, in *Bullard v. Harrison*, 4 Maule & S. 387, is asserted and applied by the court. The same view of the law is explicitly stated in Woolrych on the Law of Ways, 72, note g, as well as in Gale and Whately on Easements, upon a review of all the cases, pp. 53 et seq.; see also Woolrych, pp. 20, 21.

The doubt expressed in Hammond's N. P., 198, as to the doctrine of that note in Saunders, would seem to be quieted by the authorities above cited.

Whatever may be the tendency of some of the cases, including that of *Dutton v. Tayler*, 2 Lutw. 1487, the review we have given shows that the law of the subject is, for the present, settled in England.

So far as we have been referred to, or have been able to examine cases in this country, they seem to be uniform in holding or countenancing the doctrine that now prevails in England. In *Nichols v. Luce*, 24 Pick. 102 [35 Am. Dec. 302], the subject was fully discussed, and the cases were reviewed by counsel and in the opinion of the court, delivered by Morton, J., who says: "The deed of the grantor as much creates the way of necessity as it does the way of grant. The only difference between the two is, that one is granted by express words, and the other only by implication. . . . It is not the necessity which creates the right of way, but the fair construction of the acts of the parties. No necessity will justify an entry on another's land," etc.

In *Collins v. Prentice*, 15 Conn. 39 [38 Am. Dec. 61], the subject was thoroughly considered, and the leading cases were cited. Waite, J., states the law, in substance, as it is stated in the note in Saunders, cited *supra*, and remarks: "And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties." The same case came before the court again, and is reported in 15 Conn. 423. The court say: "A way of necessity can only be created in lands owned by the grantor at the time of the conveyance, and must be either reserved in the lands conveyed,

for the benefit of the grantor, or created in other lands of the grantor for the benefit of the grantees. It arises from a fair construction of the deed as to the presumed intent of the parties. And it affects nobody but the parties to the deed, and those claiming under them."

In *Seeley v. Bishop*, 19 Conn. 134, Ellsworth, J., says: "In the case of *Collins v. Prentice*, 15 Id. 39 [38 Am. Dec. 61], this court recognized fully, and to as great an extent as any other court, the doctrine of a way of necessity." The case of *Pierce v. Selleck*, 18 Id. 321, cited by the defendants' counsel, does not present any view of the law different from, or in any way modifying, the doctrine stated and held in *Collins v. Prentice*, *supra*. In *Brice v. Randall*, 7 Gill & J. 349, it is held that the fact that a person has no right of way, except over the defendant's land, is not, of itself, sufficient to give him a right of way from necessity.

Chancellor Kent, 3 Com. 423, 424, after referring to various English cases, states the doctrine contained in Sergeant Williams' note, cited *supra*, and says: "This would be placing the right upon a reasonable foundation, and one consistent with the general principles of the law": 3 Cru. Dig. 87. In a learned note by Professor Greenleaf, it is said: "But necessity alone, without reference to any relations between the respective owners of the land, is not sufficient to create this right." He then cites *Bullard v. Harrison*, 4 Maule & S. 387, Sergeant Williams's note, Woolrych on Ways, and 3 Kent's Com. 423, 424, as they are cited *supra*.

From this reference to the American cases and books, it appears that the law of the subject, as now held in England, is received and adopted in this country to a sufficient extent to warrant the court in adopting the same doctrine, so far as it is applicable in this case. Indeed, if the question were now resting in general principles, unaffected by the discussions and decisions to which reference has been made, we should be very slow to hold that the necessity of a land-owner, for a convenient way to and from his land, would create in him the right to encumber the land of a contiguous owner with the servitude of such way, independently of some former unity of ownership of the two parcels, and the implication of a grant or reservation of such right, and independently of any right established by prescription.

If this right, as claimed by the defendants in this case, were to be put on the ground of the requirements of the pub-

lic good, as was done in assigning the reason for the decision in *Dutton v. Tayler*, 2 Lutw. 1487, it might with propriety be suggested, whether the constitutional provision, as to taking private property for public use without compensation, would not challenge consideration as a conclusive objection to the claim.

The provisions of the statute for pent or bridle roads seem to have been made to answer to all the real necessities for a way, such as is claimed to be needed in this case, and at the same time to yield a due regard to the principle and spirit as well as to the letter of that provision of the constitution.

On the whole, we are satisfied that the plea cannot be sustained, either upon principle or authority.

The judgment is therefore reversed.

GRANTOR IN DEED OF WARRANTY MAY HAVE WAY OF NECESSITY OVER LAND GRANTED: *Brigham v. Smith*, 64 Am. Dec. 76. But the right of way is not incident to the grant unless there be an actual necessity, and not a mere inconvenience: *Screen v. Gregorie*, Id. 747; *Hall v. McLeod*, 74 Id. 400. Right of way to land devised, over other land of testator, is appurtenant to the land devised, and passes by a conveyance thereof without express mention: *Lide v. Hadley*, 76 Id. 338; see the cases collected in the notes to these cases. In a note to *Cooper v. Maspin*, 35 Id. 464, the question decided in the principal case is discussed.

MALLORY v. LEACH.

[35 VERMONT, 156.]

AVERRING GREATER DAMAGES THAN PROVED is no variance.

PAROL EVIDENCE IS ADMISSIBLE ON PART OF ONE PARTY TO WRITTEN AGREEMENT, when it shows that the relations of the parties were specially confidential, that the plaintiff had great confidence in the defendant, and relied upon his advice, and was likely to be guided by it.

CONFIDENTIAL RELATION BETWEEN TWO PERSONS MUST BE SHOWN TO EXIST AT TIME DEFENDANT is claimed to have defrauded plaintiff by a violation of it. Where an estrangement between two persons who formerly occupied confidential relations toward each other is shown prior to the time one claims to have been damaged by relying upon the advice and disclosures of the other, the former has no cause of action for the fraud.

WHERE ONE WHO OCCUPIES CONFIDENTIAL RELATION TOWARDS ANOTHER WHO IS OWNER OF SOME SHARES OF STOCK tells the latter that a large assessment is about to be levied upon the stock, without at the same time telling her other facts within his knowledge which would enhance her confidence in the value of her property, whereby she is induced to sell her stock to defendant at a price much below its true value, he is liable for damages for his fraud, the measure of which would be the difference between the price paid, and the true value of the stock.

AM. DEC. VOL. LXXXII—69

ONE WHO HAS BEEN FRAUDULENTLY INDUCED TO SELL PROPERTY AT PRICE FAR BELOW ITS VALUE, and afterwards discovers the fraud, does not waive the fraud by accepting the amount agreed to be paid for the property. She may claim the amount due her under the contract, and still have an action against the defendant to recover compensation for the injury occasioned by his fraud.

CASE. Plaintiff alleged that she was the owner of fifty shares of mining stock of the true value of which she was ignorant, and that defendant undertook to inform her of its true value; that he knew its value to be thirteen hundred dollars, but concealed this knowledge from plaintiff, and fraudulently induced plaintiff to believe that the stock was of a much less value; that for the purpose of depreciating its value in her estimation, he represented to her that the stock was about to be heavily assessed, whereas the assessment which was to be levied was a very immaterial sum; that plaintiff relied upon the representations of defendant, and consequently believed the stock to be of much less than its true value, and that she thereupon transferred the stock to defendant for \$275. Plaintiff introduced evidence supporting the allegations of her declaration. She showed that defendant, in December, 1857, had \$275 of her money on hand; that he said he wanted to do something for her; that he wanted to make her independent, and that he thought that if he purchased some of the shares of the Franklin Mining Company that it would be a splendid investment; that the investment would pay twenty per cent the first two years; that defendant was interested in the stock himself, and that he would keep her informed as to its value and condition. Defendant offered to make a written agreement with plaintiff, guaranteeing to take the stock back at the end of two years, with the twenty per cent added for the same sum of \$275, if she did not at the time wish to keep the stock. Plaintiff, having no knowledge of her own on the subject, accepted his terms, and he delivered to her the written agreement. Defendant's counsel objected to parol evidence of what was said by the parties in relation to the transaction. The court admitted what was said previous to and at the time of making the contract, as showing the situation and relation of the parties. Plaintiff also showed that in June, 1859, after the above-described representations of the defendant tending to depreciate the value of the stock in her mind, she sent word to him that she had concluded to have him take back the stock in accordance with the terms of his contract; that de-

defendant assented, and paid her \$94.50, and his note payable in six months for \$290.50. This note has since been paid. At this time the stock was worth thirteen hundred dollars, which fact was well known to defendant, but that plaintiff was entirely ignorant of it, and relied upon the defendant's correctly informing her as to its true value. The evidence of the defendant was of a character to negative all the proof of the plaintiff.

Roberts, Briggs, and Nicholson, for the defendant.

Linsley and Prout, and Phelps, for the plaintiff.

By Court, ALDIS, J. I. As to the alleged variance, it may be observed that it consists in averring the injury occasioned by the plaintiff's fraud to be greater than it was proved to be. But in the averment of damages, it is not necessary to be exact; and the proof need not sustain the allegations in this respect.

II. The parol evidence was admissible as tending to show the fraud,—not as qualifying the written contract. It tended to show a special confidence and relation between the parties in regard to this business, and if proved to the satisfaction of the jury to have existed in the outset, and to have continued to the time of the repurchase by the defendant, must materially have given character to both the defendant's words and silence, as intended to induce the plaintiff to act under a delusion. This leads us to the main point, viz., the testimony on the part of the plaintiff, and the charge of the court in regard to it. The testimony of the plaintiff tended to show that the defendant, in advising her to buy fifty shares of mining stock, professed to act as her friend, from a desire to invest her money so as to make her independent, and in a mode that was to be kept secret from all but her father and mother, and with his own guaranty that she should get back her money and at least twenty per cent interest. He told her that as he was interested in the stock, he would keep her informed as to its situation and value, and that he should go to the mines in June, 1859. This declaration of the defendant is to be considered in connection with the fact that by the written contract, he was to decide on the 1st of July, 1859, to keep or to sell her stock. That such language would strongly tend to beget confidence and trust in the defendant, and lead the plaintiff to rely upon his advice, and to be guided by it on his expected return from the mines in June, 1859, is obvious. This must have been the purpose for which he thus advised her; and

we think he must have been aware of the effect that it produced on her mind at that time.

Now if this relation of trust and confidence continued from December, 1857, when she bought the stock, to July, 1859, when she sold it to the defendant, and he, at the time of his purchase, knew that she thus trusted in and relied upon his friendship and advice in this matter, it was clearly his duty to tell her of its real value, and it was a fraud to take advantage of her ignorance and buy it at about a quarter of its market price. But if during this period of time this relation of confidence ceased to exist, and alienation and distrust had taken its place, then it is obvious that he could not have supposed she was relying upon his friendship and advice in this business, and was not under obligation to give her information in regard to the value of her stock.

There was testimony on the part of the defendant tending to establish this state of facts. The fraud of the defendant (if any) consisted in taking advantage of the confidence which he knew the plaintiff put in him, and which he had sought to win; but if she had lost her confidence in him, he could no longer take advantage of it.

The court distinctly stated to the jury that no obligation rested upon the defendant by virtue of the contract to inform her of the real value of the stock. To have required that, would have been to add a new clause to the contract. The court then proceeded to refer to those circumstances which gave rise to a relation of trust and confidence between the parties in this matter, and made it the duty of the defendant to inform her of what he knew as to the value of the stock, and then said to the jury, "because he had placed himself in such a relation, it would be a fraud in him to receive back the stock without giving her the knowledge he possessed." This put the case clearly on the ground of fraud in taking advantage of a confidence he had sought, and which he knew was placed in him.

The doubt we have felt in regard to the correctness of the charge in this respect is, whether the court sufficiently called the attention of the jury to the fact that this relation of confidence must exist between the parties at the time of the purchase by the defendant, and to those circumstances shown on the part of the defendant tending to prove that the relation had ceased to exist. We have carefully examined the exceptions on this point, and cannot but regret that the statement in

this respect is not more satisfactory. It does not appear that the defendant in his requests to the court called their attention to this part of the defense, or made any request in regard to it. The defendant's evidence was admitted. The court treated the promise of the defendant to inform her of the situation and value of the stock from time to time as a continuing promise, and seem to carry the idea that the plaintiff must have continued to rely on it. As there is no direct request to charge in regard to this part of the defense, and as no exception was taken on the ground of an omission in this respect, and as it would have been the duty of the defendant to have called the attention of the court to this point, if not sufficiently referred to in the charge, and as the general tenor of the charge seems to require that the confidence should have existed at the time of the resale, we think we should not be justified in opening the case on this ground.

The defendant further claims that the charge of the court in regard to the representation made by the defendant, that there was about to be a large assessment made upon the stock, was incorrect. The substance of the charge is,—if the defendant said this with a view to mislead the plaintiff as to the value of the stock,—if the fact was calculated to depreciate its value, and to induce her to sell at a price less than the value, and she was thereby deceived and induced to sell, he would be liable, unless he disclosed his knowledge of facts tending to enhance its value.

1. This does not assume, as matter of law, that the fact would depreciate its value, and induce her to sell. That question is left to the jury. It is obvious that, ordinarily, an assessment of twenty-five per cent upon stock, unexplained, would lead the holder to suspect something might be wrong; especially if it was not expected by stockholders that such an additional payment was to be made. So if the holder of the stock was a poor person, and unable, without trouble and inconvenience, to raise the sum assessed, it would tend to induce such person to sell the stock. We think the evidence admissible, as tending to show that the defendant made declarations which he must have been aware would embarrass the plaintiff, and lead her to wish to part with her stock.

It was telling the truth, but not the whole truth. It was telling it in a manner to produce the effect of a falsehood. The defendant must have felt that what he said would depress the plaintiff's estimate of her stock,—would lead her to think its

value much less than it was; and he knew she was ignorant of its true value. Now he might be silent,—might say nothing; but he had no right to produce a delusion by his language, and knowingly take advantage of it for his own benefit. This was not fair dealing, and was very properly characterized in the charge of the court.

III. It is further claimed that the receipt by the plaintiff of the amount of the note given for the stock, after she knew of the fraud, was a ratification of the contract, so that she cannot now sue for the deceit.

Let us consider what the rights of the parties were when the defendant had, by fraud, procured a transfer of the stock to himself.

1. As to the defendant, it is obvious that he could not take advantage of his own wrong,—he could not rescind the contract, but was bound by it to pay the note.

2. As to the plaintiff, as fraud avoided the contract, she had the right, if she saw fit, upon discovery of the fraud, to treat the contract as wholly at an end,—to return to the defendant his note, and demand a reconveyance of the stock. This would have been to rescind or disaffirm the contract. If she thought that the stock would continue to advance in value and remain a highly profitable investment, she might have deemed it for her interest to have back the stock; and in order to accomplish this, she should have given notice immediately to the defendant, that she disaffirmed the contract and demanded back her stock. But she was not bound to do this. She might claim what was due her by contract, and also rely upon her right to recover her damages, for the amount of which she had been defrauded,—which would be the difference between what the defendant had agreed to pay her for the stock and its true value. In such case, she would have ratified the contract, but would not have thereby waived her claim to damages.

The fallacy of the defendant's claim is this: that it supposes a ratification of the contract to be a waiver of the right to recover damages. Not at all. The plaintiff has the right to hold the defendant to his contract, and also to recover of him compensation for the injury occasioned by his fraud. How can the defendant complain of this? It is but making the plaintiff good. It cannot injure the defendant, or deprive him of any defense, or impair any right.

If the plaintiff had seen fit to rescind the contract, but had

waited an unreasonable time before giving notice,—pondering upon the fluctuations and chances of the market before making a decision,—the defendant might perhaps say with justice that such delay tended to deprive him of his reasonable opportunity to sell, and that he might well suppose she had concluded to ratify the sale, and ask not for her stock, but only for damages. Her right to her damages was perfect when the fraud was committed. It is a right not legally to be extinguished, but by compensation or by voluntary release. To infer a release of the damage from her receiving payment of the note, would be putting an unreasonable construction on the act. She thereby takes what the defendant agreed to pay, and neither claims nor relinquishes her rights growing out of the fraud.

The case cited by the defendant, *Clark v. Le Cren*, 9 Barn. & C. 57, only shows that though the vendor of goods sold through fraud, and upon a credit, might sue in trover for the goods before the credit expires, yet if he proceed upon the contract of sale, he cannot sue till the credit has expired. The principle of that case does not conflict with the plaintiff's right to recover his damages after receiving payment of the note. When he sues upon the contract, he must be bound by it; but when damage results from the fraud, beyond what he can recover by contract, he can also recover in an action on the case for the deceit.

In 2 Parsons on Contracts, 278, in a note, it is said: "If a party defrauded brings an action on the contract to enforce it, he thereby waives the frauds, and affirms the contract." The authorities cited to sustain this are *Selway v. Fogg*, 5 Mees. & W. 88, and *Saratoga & S. R. R. Co. v. Row*, 24 Wend. 74 [35 Am. Dec. 598].

In *Selway v. Fogg*, *supra*, the action was *assumpsit* for work in carting away rubbish. The plaintiff, induced by the fraudulent representations of the defendant as to the depth of the rubbish, agreed to do the work for fifteen pounds, which had been paid him. He sought by this action to recover for the value of his work above the fifteen pounds. It appeared that the plaintiff had knowledge of the circumstances indicative of the fraud before the work was finished. Upon the trial, Abinger, C. B., was of the opinion that the question of fraud was not open to the plaintiff in the present action, although it might be the subject of complaint in another. Upon hearing in the exchequer, Abinger, C. B., said: "A party cannot be

bound by an implied contract when he has made a specific contract which is avoided by fraud. If he repudiate the contract on the ground of fraud, as he may do, he has a remedy by an action for deceit."

So far, the opinion stands upon solid ground, and was required for the decision of the case. But when the Chief Baron proceeds to say, "Secondly, the plaintiff had full knowledge of all that constituted the fraud, during the work, and as soon as he knew it he should have discontinued the work and repudiated the contract, or he must be bound by its terms," if he means that the plaintiff could not, in such a case, recover for the damage he suffered from the fraud in an action for the deceit, he says what was not required for the decision, and what we deem untenable as a rule of law. Consider in what a position the plaintiff is put by the application of such a rule. He proceeds with his work till it is in part done, and then discovers "circumstances indicative of fraud." He may be fully convinced that he has been defrauded, and yet feel great doubt that he can prove it. He says to himself: "If I proceed and finish the work, I shall be entitled, in any event, to the contract price. If I stop and fail to prove fraud, I cannot recover for the work I have done. If I proceed and finish the work, and still shall be able to prove fraud, why should I not be entitled to recover the full value of all my work? Why should I be bound to a contract price to which my consent was procured through fraud? How does my going on with the work injure the defendant, or purge his fraud? If he has been guilty of fraud, he knows it, and needs no notice from me to put him on restitution." If, however, the going on with the contract injures the defendant's rights, or puts him in a worse condition than he would be by rescission, then the plaintiff ought not to go on, but to stop and give notice. But the defendant cannot justly claim it as his right not to have the work done at all unless he can have the advantage of his fraud, and get it done for less than its fair value. When he agreed to have the whole work done, and decided to try to get it done for less than its value through fraud, he should have considered that the plaintiff might not discover the fraud till the whole work was done; or might, if he did discover it, doubt his ability to prove it, and so reasonably go on and finish the work; and yet, in either case, it would be flagrant fraud in him to pay only the contract price.

The Saratoga & S. R. R. Co. v. Row, 24 Wend. 73 [35 Am.

Dec. 598], was where the defendant, before commencing the work, knew of the alleged fraud, and had all the knowledge as to the fact said to be misrepresented that the plaintiff had, and could not have relied on such representation. The court say: "If the truth had not been discovered till after the performance of the contract had been commenced, a different question would have been presented."

In *Kimball v. Cunningham*, 4 Mass. 502 [3 Am. Dec. 230], the question was whether the defrauded party, who had affirmed the contract, could retain in his possession personal property, a part of the consideration, which by the contract was to pass to the other: held, that the contract, if affirmed, was affirmed as a whole, and that the defendant was liable in trover for the property so withheld. It also appeared in the case that the defendant had sued for his damages from the fraud in an action on the case. The court say, by this action it is clear he has made his election to consider the contract as subsisting and to recover damages for the breach of it.

If so, the fraud was not waived in the sense of waiving the right to recover damages for it.

In *Campbell v. Fleming*, 1 Ad. & E. 40, the plaintiff sought in an action of *assumpsit* to recover the price he had paid for shares in a mining company which he had been induced to buy by fraudulent representations. After knowledge of the fraud, he consolidated the shares with other property in a new company, and had sold shares in the new company. Held, that such sales of the new shares, after knowledge of the fraud, was an affirmation of the contract, so that he could not sue for and recover back his purchase-money. The decision does not touch the point that he could not recover, in an action for the deceit, the damages he suffered by it.

The whole subject is well considered in *Whitney v. Allaire*, 4 Denio, 554; and the court say: "There is no principle or authority showing that where a person has been defrauded by another in making an executory contract, a subsequent performance of it on his part, even with knowledge of the fraud, acquired subsequent to the making and previous to the performance, bars him of any remedy for his damages for the fraud. The party defrauded, by performing his part of the contract with knowledge of the fraud, is deemed to have ratified it, and is precluded thereby from subsequently disaffirming it. That is the extent of the rule. His right of action for the fraud remains unaffected by such performance. But

having gone on after discovering the fraud, he cannot afterwards disaffirm the bargain, or sue for the consideration." The principle and its reason apply to this case. Upon this subject, see Long on Sales, 219, 240; 2 Kent's Com. 480; *Pierce v. Wood*, 23 N. H. 520; *Gray v. Rich*, 10 Ind. 480; the remarks of Sherman, J., in *Kellogg v. Denslow*, 14 Conn. 424, 425; *Henckley v. Hendrickson*, 5 McLean, 170; *Cook v. Castner*, 9 Cush. 266.

Judgment affirmed.

FRAUD, WHAT IS, AND HOW ESTABLISHED in cases analogous to the principal case: *Bell v. Byerson*, 77 Am. Dec. 142; *Brown v. Montgomery*, 75 Id. 404; *Gould v. New York Mut. Fire Ins. Co.*, 74 Id. 494; *Davis v. McNalley*, 73 Id. 159; *Bunn v. A.H.*, 72 Id. 639; *Moore v. Pierson*, 71 Id. 409; *Lins v. Wright*, 70 Id. 289; *Ellis v. Matthews*, Id. 353; *Burch v. Smith*, 65 Id. 154; *McGar v. Williams*, 62 Id. 739; *Mitchell v. Zimmerman*, 51 Id. 717; *Juman v. Toulmin*, 44 Id. 448.

PLAINTIFF'S CLAIMING MORE THAN HE PROVED, or more than he legally could demand, or his presenting his claim on different grounds in different counts in his declaration, forms no objection to his right to recover in an action to recover damages: *Cole v. Spross*, 56 Am. Dec. 696.

TIER v. LAMPSON.

[35 VERMONT, 179.]

PRINCIPAL AND AGENT. — By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter, to the other in the capacity of his agent.

IMPLIED AUTHORITY OF AGENT ARISING FROM GENERAL EMPLOYMENT CONTINUES after the agency has in reality ceased, as far as concerns parties, who have given credit before, and still continue to give credit to it, and who have not actually been notified of the change, and cannot be presumed to have had notice of it.

THE opinion states the facts.

Washburn and Marsh, for the defendant.

A. L. and H. E. Miner, for the plaintiff.

By Court, KELLOGG, J. The notes upon which the plaintiff claims to recover in these three suits were executed to him by one Francis Draper in the name of the defendant, and were respectively signed "Jonas Lampson, by Francis Draper." One of the notes is for sixty-eight dollars, dated September 8, 1854; another is for fifty dollars, dated April 7, 1856; and the other is for twenty-seven dollars, dated August 15, 1857. It

appears from the referee's report that Draper carried on the business of a blast furnace, or of making pig-iron from the ore, and also of a store in connection therewith, at Dorset, from the spring of 1853 to the year 1858, in the name of the defendant. The note dated September 8, 1854, was given for the plaintiff's interest in a horse which Draper purchased, assuming to act as the agent of the defendant, and it appeared that this horse was used in and about the furnace business for some two or three years after that time, and was finally sold by Draper, and the proceeds of the sale were applied by him in the purchase of goods which went into the store. The plaintiff worked in the furnace business carried on by Draper in the defendant's name, from the time that business was commenced "till April, 1854, and for some three or four years thereafter," and the other two notes were given for balances due to him for his labor in and about the furnace business. The question to be decided is, whether the facts found by the referee will justify a recovery by the plaintiff against the defendant upon these notes or upon the consideration on which they were executed.

The contract between the defendant and Draper dated March 28, 1853, contemplated that the defendant should purchase the furnace and ore-bed at Dorset, and should put the furnace in proper condition for manufacturing pig-iron, and keep the same in operation for one year, he providing and furnishing "all necessary and proper tools, utensils, labor, teams, carriages, board, and all other things necessary and proper for carrying on the business of making pig-iron from the ore." At this time, the defendant was expecting to remove to Dorset, and carry on the business under his own personal supervision as well as in his own name. The defendant, during the year mentioned in the contract, made advances, as contemplated in the contract, in money and other property amounting to about eight thousand dollars. About the 1st of May, 1853, Draper was at the defendant's house in Windsor, and it was then agreed between him and the defendant that the defendant should not remove to Dorset, as at first contemplated, but that Draper should repay to the defendant all sums then advanced, or thereafter to be advanced by him, with interest, and should also pay the defendant for his trouble in and about the business; and at the same interview, Draper told the defendant that he should want to do business in his, the defendant's, name, and the defendant replied that "he could not do any-

thing to make him [the defendant] liable." Soon after the making of the contract of March 28, 1853, Draper and the plaintiff removed from Windsor to Dorset, and commenced work upon the furnace; and when the plaintiff begun his work in and about the furnace, Draper told him that "his work would be for the defendant, and not for him, the said Draper." Up to the time of the making of the agreement between the defendant and Draper on or about the 1st of May, 1853, the furnace business was carried on by Draper for the defendant, as well as in his name, and this was contemplated in their contract dated March 28, 1853. That contract, by its express provisions, also contemplated that "labor and teams" were proper and "necessary" for carrying on the business; and during this period, Draper had the management and control of the business which was so carried on, and was acting in the character of a general agent of the plaintiff while so carrying on the business. The plaintiff was employed by Draper, not for himself, but for the defendant; and in this state of the facts, it cannot be doubted that the defendant was liable, at the time the plaintiff commenced his labor, upon the contract made with him for that labor by Draper, acting in the name and on the behalf of the defendant. The facts reported furnish no ground for any inference that the plaintiff gave credit to Draper, or to any one but the defendant. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent: 2 Kent's Com. 614.

Under the agreement made on the 1st of May, 1853, the defendant, as between himself and Draper, was to have no interest in carrying on the furnace business, but was to be repaid by Draper for his advances, and compensated for his trouble, and after this time, the business was in fact so considered and treated as between the defendant and Draper. But Draper continued to carry on the business in the defendant's name as before; and the defendant knew that Draper was so carrying on the business as late as February, 1855, when he, for the first time, told Draper that he must not do business in his name any longer. No notice was given by the defendant to the plaintiff of any change in the relations between himself and Draper at any time, and it does not appear that the plaintiff had any reason to suppose that those relations were different at the time when these notes were executed from what

they were when he commenced his labor under his first employment by Draper. The defendant virtually authorized Draper to carry on the business in his name, and this was an apparent authority to him to procure such labor and teams as might be necessary in carrying on the business. The plaintiff would be justified in relying on this apparent authority to Draper until he had reason, either from express or public notice proceeding from the defendant, to believe that Draper was no longer authorized to act as his agent. The plaintiff, having the right at the commencement of his labor to look to the defendant for payment, and having no notice of any change in the relations between the defendant and Draper, would be justified in considering the contracts of Draper, while continuing to act professedly as the agent of the defendant as binding upon the defendant. The implied authority arising from general employment continues even after the agency has in reality ceased, as regards parties who have before given and continue to give credit to it, and who have not actually received, and cannot be presumed to have had, notice of the change: Chitty on Contracts, 10th Am. ed., 225. We are unable to distinguish between the liability of the defendant for the labor of the plaintiff before the agreement of the 1st of May, 1853, and his liability for the plaintiff's labor after that agreement; and we consider the defendant liable to the plaintiff on account of the labor and property which formed the consideration of the notes in suit.

The judgment of the county court in each of these three suits, which was *pro forma* in favor of the plaintiff, is accordingly affirmed.

NECESSITY AND METHOD OF GIVING NOTICE THAT AGENT'S AUTHORITY HAS BEEN REVOKED. — It is a familiar principle of law, upon which the authorities are entirely harmonious, that a general agent whose authority has been revoked may continue to bind his principal in his dealings with third persons who have been accustomed to deal with him in his capacity of agent, and who have not been notified of the revocation of his appointment and authority. Upon this question, Parsons, in his great work on contracts, remarks that "where third parties have dealt with an agent, clothed with general powers, whose acts have therefore bound his principal, and the principal revokes the authority he gave his agent, such principal will continue to be bound by the further acts of his agent, unless the third parties have knowledge of the revocation, or unless he does what he can to make the revocation as notorious and generally known to the world as was the fact of the agency": Page 74, 6th ed. This is the tenor of all the cases, ancient and modern: *Anonymous v. Harrison*, 12 Mod. 346; *Hazard v. Treadwell*, 1 Strange, 506; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Rice v.*

Barnard, 127 Id. 241; *Ins. Co. v. McCain*, 96 U. S. 84; *Brassell v. American L. Ins. Co.*, 75 N. C. 8; *Ulrich v. McCormick*, 66 Ind. 243; *Meyer v. Hehner*, 96 Ill. 400; *Beard v. Kirk*, 11 N. H. 397; *Claffin v. Lenheim*, 66 N. Y. 301; *McNeilly v. Continental Life Ins. Co.*, Id. 23; *Fellows v. Hartford and New York Steamboat Co.*, 38 Conn. 197; *Barkley v. Rensselaer and Saratoga R. R. Co.*, 71 N. Y. 205; *Hatch v. Coddington*, 95 U. S. 48; *Rice v. Isham*, 4 Abb. App. 37; *Wright v. Herrick*, 128 Mass. 240; *Diceray v. Kellogg*, 44 Ill. 114; *Morgan v. Still*, 5 Binn. 305; Story on Agency, sec. 470; Wharton on Agency and Agents, sec. 111. As to the method of giving notice that an agent's authority has been revoked, or as to the character of notice required, it is obviously impossible to lay down any definite rules. Upon this question, Mr. Justice Rapallo, in *Claffin v. Lenheim*, 66 N. Y. 305, says: "The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency is governed by the same rules as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least that the credit should have been given under circumstances from which notice can be inferred. Where the circumstances are controverted, or where notice is sought to be inferred as a fact from circumstances, the question is for the jury; they must determine as a question of fact whether the party claiming against the partnership or the principal did have notice of the dissolution or revocation; and there being some evidence of the fact of notice, the court in the present case properly submitted to the jury this question of fact." In speaking of giving notice of the revocation of an agent's authority, Mr. Parsons says: "This is usually done by advertising, and usage will have great effect in determining whether such principal did all that was incumbent on him to make his revocation notorious"; *Contracts*, 7th ed., 75.

In *Brassell v. American Life Ins. Co.*, 75 N. C. 8, the court seem to think that actual notice of an agent's dismissal is necessary to protect his former principal from being bound by the agent's dealing with those with whom he formerly dealt; and in *Claffin v. Lenheim*, 66 N. Y. 301, the court say that dubious or equivocal circumstances will not be substituted for actual notice, and that it is doubtful whether the doctrine of constructive notice is applicable to such a case. In this case, accordingly, where defendant employed his brother to carry on a store and purchase goods for him, which he did for some time, when the store was partially burned, the agent dismissed and business discontinued; and where the defendant, after about two years, commenced business again in the same place, and his brother, without authority, purchased goods from the same dealers, in defendant's name, — it was held that the fire and the cessation of business were not sufficient circumstances upon which to charge plaintiffs with constructive notice of the revocation of the agent's authority. So in *Fellows v. Hartford and New York Steamboat Co.*, 38 Conn. 197, where the defendants, a steamboat company, had employed a man as steward with authority to purchase supplies for the boat, and afterwards revoked his authority, and advertised for proposals to supply their boats directly, the former steward under this advertisement secured the contract to furnish supplies to one of the boats, and then went and bought the goods of plaintiff as he had formerly done before his discharge, and had them charged to defendants. They were held liable for their price, as plaintiffs had not been notified directly, and defendants' advertisement for supplies was held not to amount to constructive notice.

SWEETZER v. JONES.

(35 VERMONT, 317.)

WHEREIN MORTGAGES OF ONE PIECE OF LAND CONVEYS AWAY ANOTHER PIECE of land, and in his conveyance describes the latter as subject to his mortgage, this reservation is just as effectual to charge the property conveyed with the encumbrance of the mortgage debt as if it had been included in the mortgage deed.

STEAM-ENGINE AND BOILERS WHICH FURNISH MOTIVE POWER TO MARBLE-WORKS, AND WHICH ARE ATTACHED to the realty by brick-work, granite masonry, and bolts, are fixtures, and will be regarded as part of the freehold.

WHERE STEAM-ENGINE AND BOILER, ATTACHED TO FREEHOLD, furnish the motive power for mill machinery which can be readily moved without injuring the mill, this latter circumstance does not change the character of the engine and boiler as fixtures.

NOT FIXTURES.—Saw-frames in a marble-mill, attached at the top and bottom with bolts, and used for steadying the saws, are not fixtures.

PETITION for foreclosure of mortgage. The opinion states the case.

Peck and Colby, for the petitioner.

Redfield and Gleason, for defendant Spaulding.

By Court, **KELLOGG, J.** This is a bill of foreclosure on a mortgage from the defendant Jones to Wentworth S. Butler, of certain lands, buildings, machinery, etc., in Roxbury, the mortgage having been duly assigned to the orator. The defendant E. N. Spaulding, in his answer, states that on the 21st of December, 1857, he caused a portion of the real estate, described in the orator's bill, with a steam-engine and boiler situated thereon, and the tools and machinery, and all the personal property in and about the buildings on said premises, to be duly attached on a writ in his favor against the Roxbury Verd Antique Marble Company, and that, at the March term of the Washington County court, in 1858, he recovered a judgment against said company, and that, on the 28th of June, 1858, he caused the execution issued on the said judgment to be levied upon the property so attached, and that the real estate so levied upon was duly set off to him on said execution, and that the said engine and boiler and other machinery and personal property so levied upon was legally sold on the said execution; and he insists that the title of all the property so levied on, set off, and sold, was vested in the said company at the time of the said attachment, that by virtue of said levy, set-off, and sale, he obtained an absolute title to the real and personal

estate included in the levy, and that the steam-engine and boiler, and also the machinery situated in the buildings on said premises, were personal chattels and subject to attachment as such. Under this sale and levy, this defendant, by his answer, makes a claim to a certain piece of land containing about six acres, with a mill upon it for sawing and manufacturing marble, and a stationary steam-engine, and the boilers, and the saw-frames in the mill. All the questions made in the case arise upon the answer of this defendant.

The title on the part of the orator to the property in controversy, is derived from a mortgage deed from the American Verd Antique Marble Company to Josiah W. Butler, dated September 25, 1855, executed to secure the payment of the sum of twenty-five thousand dollars. It is conceded that at the date of this mortgage deed, the title to the six-acre piece on which the mill was situated was in one Alvin Braley, although the mill was then used and occupied by the mortgagor. The title of Braley was conveyed to William Plumer by deed, dated March 5, 1856, and Plumer conveyed the same title to the said Josiah W. Butler by deed, dated February 7, 1857, and Josiah W. Butler conveyed the six-acre piece to the Verd Antique Marble Company, by deed dated March 10, 1857, and the said last-named company conveyed the same to the Roxbury Verd Antique Marble Company, by deed dated April 18, 1857. The two last-mentioned deeds expressly subject the premises thereby conveyed to the encumbrance of the mortgage deed executed by the American Verd Antique Marble Company to Josiah W. Butler, as above mentioned, and the deed from the Verd Antique Marble Company to the Roxbury Verd Antique Marble Company contains a provision that the grantee shall pay the said mortgage, and a statement that the agreement of the grantee to make this payment was a part of the consideration expressed in the deed. This mortgage deed having been assigned to the said Wentworth S. Butler, he commenced a foreclosure suit thereon against the American Verd Antique Marble Company, and the Roxbury Verd Antique Marble Company, in which a decree of foreclosure, covering the six-acre piece as well as the other real estate described in the mortgage, was made at the March term of the court of chancery in Washington County, in 1858. The time allowed for the redemption of the premises having expired without payment of the decree, a writ of possession was issued upon the said decree, and the said Wentworth S. Butler was

put in possession of the premises included in said decree, under and by virtue of the said writ, on the 3d of June, 1859.

The chancellor rendered a decree of foreclosure against the defendants, including the six-acre piece on which the mill was situated. The chancellor also held that the steam-engine, boilers, and saw-frames in the mill were chattels, and not fixtures, and therefore passed to the defendant by his levy already mentioned, and that the orator had no claim thereto under his mortgage. From this decree the orator appealed.

From this statement of the case, it is apparent that this defendant, as a levying creditor of the Roxbury Verd Antique Marble Company, must stand upon the right which that company had to the property in controversy at the time of his attachment. We have not regarded it as our duty to consider the various objections which have been urged on the part of the defendant in respect to the defective execution of the mortgage deed to Josiah W. Butler, because no copy of that instrument has been furnished to us, and for the further reason that the deed from Josiah W. Butler to the Verd Antique Marble Company, under or through which the title asserted by the defendant must be derived, expressly subjects the six-acre piece, upon which the property in controversy is situated, to that mortgage, and this, as against that company and all persons standing upon its right, must be taken as equivalent to a reservation of a lien on the property conveyed by the deed for the payment of the mortgage debt, and this would be just as effectual to charge the property conveyed with the encumbrance of the mortgage debt as if it had been created by a valid mortgage deed. The only remaining question made in the case relates to the character of the engine, boilers, and saw-frames,—whether they are to be regarded as fixtures, and so parcel of, or incident to, the real estate conveyed to the orator by his mortgage, or as personal chattels which were subject to the defendant's attachment and sale.

The following is a description of the property in controversy, as given by Mr. Belknap, whose testimony in this respect has been adopted by the parties as a statement of facts in relation to this part of the case:—

“There are two boilers, set in brick, on the outside of the main building; the boilers are covered by a single roof, running against the building under the eaves. The engine is outside of the main building, covered by a building made for that purpose. Steam conveyed to the engine by a pipe some

twenty-five feet. Engine sets upon granite base, bolted to the granite by six bolts and nuts,—granite supported by a stone wall. Attached to the engine is a crank shaft, on which is a fly-wheel or pulley,—one end of crank resting on the bed-piece of the engine, the other one on plumb block. The belting passes over the fly-wheel to the main shaft. This lies horizontal over the beams. The shaft rests in iron boxes, which are bolted to the beams, and upon main shaft on pulleys or drums, over which belts pass to carry various machinery, to wit, six gangs of saws, horizontal saws, belting frames from main shafts to counter-shafts, and crank shafts, which gave the motion to the saws. These counter-shafts have timbers run to the ground and bolted with bolts and nuts to timbers a foot under ground. The shaft rests on boxes some foot and a half above ground bearings. There are five counter-shafts, with a pulley on each; one drives two gangs of saws.

“There are timbers bolted above the beams to the beams, and the upright pieces are attached to those timbers, put in since the building was erected, for the purpose of steadying the saws. The upright, or guides to the saws, are fastened to the timbers above by a bolt and nut, and extend to timbers on the ground, and fastened to them with a cast-iron step, put on to the bottom of the upright to keep it from rotting, and makes a kind of tenant in the building. The saws were put in after the building was finished, and could be removed without injury to the building.

“The boiler has brick-work around it, and comes to about six inches of the top. To take out the boiler would disturb the top of the brick-work, but not necessarily the arches. Thickness of brick, say eight inches, except next the main building, where it is some eighteen inches; should think the boiler some four feet in diameter.”

There can be no question but that the mill is a part of the realty, and that as such it would pass to a mortgagee, whether erected previous or subsequent to the date of the mortgage. In the recent case of *Harris v. Haynes*, 34 Vt. 220, it was held that a steam-engine and boilers which furnished the motive power to the machinery of a carriage-shop, when annexed to the realty in a manner very similar to that in which the engine and boilers were annexed to the realty in this case, were fixtures, and were to be regarded as parcel of the freehold; and on the facts which appear in this case in respect to the engine and boilers, and the manner and purpose of their

annexation to the realty, we are satisfied that the engine and boilers now in controversy fall within the rule of that decision, and should be treated as fixtures and a part of the realty. The rule of this decision is sustained by the uniform tenor of the American and English cases upon the subject: 2 Smith's Lead. Cas., 5th Am. ed., 249-251; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306 [88 Am. Dec. 368]; *Richardson v. Copeland*, 6 Gray, 536 [66 Am. Dec. 424]; *Walmsley v. Milne*, 7 Com. B., N. S., 97 Eng. Com. L. 115. In *Hill v. Wentworth*, 28 Vt. 428, it is said that "whether the articles in question were personal property or fixtures should be determinable and plainly appear from an inspection of the property itself, taking into consideration their nature, the mode and extent of their annexation, and their purpose and object, from which the intention would be indicted." In the application of this rule to the facts which appear in this case, we regard the engine and boilers as having been set up and used for the beneficial enjoyment of the mill, and substantially annexed to it; and the fact that the machinery of the mill, to which the engine supplied the motive power, was so put in or set up, that it could be readily removed to any other building or quarry, cannot be considered as affecting the character of an actual and permanent annexation to the freehold: *Walmsley v. Milne*, 7 Com. B., N. S., 97 Eng. Com. L. 115. In respect to the saw-frames, we do not find in the manner in which they were fastened for use any such annexation to the realty as would operate to change their character as chattels, and the decree of the chancellor directing that they should be considered and treated as personal property is in accordance with the law of the subject as applied in the case of *Hill v. Wentworth*, 28 Vt. 428, and *Fullam v. Stearns*, 30 Id. 443, and *Bartlett v. Wood*, 32 Id. 372.

In accordance with these views, the decree of the chancellor is reversed, and the case is to be remitted to the court of chancery, with a mandate directing a decree to be made in favor of the orator, according to the terms of the former decree, with this exception or modification, that the engine and boilers are to be declared fixtures passing with the real estate, and as such are to be held by the orator under his mortgage; and the orator is to be allowed his costs in this court.

FIXTURES. — The law relating to fixtures is extensively discussed in *Wadleigh v. Janoria*, 77 Am. Dec. 780; *Vaughen v. Haldeman*, 75 Id. 322; *Regers v. Gillinger*, 72 Id. 694, and notes.

HENRY v. SHELDON.

[35 VERMONT, 427.]

UNDER STATUTE EXEMPTING TOOLS OF TRADE FROM EXECUTION, MACHINE FOR SPLITTING LEATHER, operated either by steam, water, or hand power, and which when run by hand required the power of two men, and which cost \$250, weighed between six and nine hundred pounds, had two knives and two rollers, was operated by a crank, and when running required to be fastened to the floor by cleats, and was movable from place to place in the shop, is not exempt.

THE opinion states the case.

Henry, for the plaintiff.

Dillingham and Durant, for the defendant.

By Court, PECK, J. This is trover for an iron and steel splitting machine, as it is called in the exceptions. The plaintiff bought the property for a valuable consideration of one Blush, a tanner and currier, who carried on the business of his trade. The plaintiff took no possession of it, but left it in the possession of Blush, in this shop, where it remained until it was afterwards levied upon and sold by virtue of an execution against Blush, in favor of one Cross. The defendant's title is by purchase at the sheriff's sale on that execution. The only question in the case is whether the property was exempt from attachment; whether it is a kind of property which the statute exempts from attachment and execution. If it is, there was no necessity of any change of possession in order to put the property beyond the reach of attachment and levy by the creditors of Blush.

It appears that the machine was used for shaving or splitting leather, operated by hand, by steam, or by water power, and that Blush had used it in each of these ways. It cost \$250, and weighed from six to nine hundred pounds, had two knives and two rollers, and was operated by turning a crank, and when operated by hand, it required two men to work it. It was kept in its place by cleats, and was movable from place to place in the shop.

It also appears that such machines have taken the place of the old mode of shaving leather by hand, and have been in use fifty years or more.

There is no claim that this property comes within any of the articles of property exempt by law, unless it is a tool, within the meaning of the statute. In *Kilburn v. Demming*, 2 Vt. 404 [21 Am. Dec. 543], the word "tool" in the statute

was construed as applying to simple instruments, ordinarily used in manual labor, and not as embracing machinery, or an article that is usually denominated a machine. It was there decided that a spinning billy and jenny which cost about one hundred dollars, and was operated by the owner by hand, and which the owner transported from place to place, and used wherever he could find employment, was not exempt from attachment. That case, so far as any decisions have been since made, has been followed, and must be decisive of this case, unless we put a different construction upon this clause of the statute. It is true, the tendency of the more recent decisions upon some parts of this statute has been towards what may seem to be a more liberal interpretation in favor of the debtor. For instance, where the statute does not define the amount of property to be exempted, but leaves it to be measured by what may be deemed necessary, as in case of household furniture, courts might allow a greater quantity to the debtor than would have been exempt in the early history of the state; but if so, it is not from applying a different rule of interpretation, but by interpreting the word "necessary," in reference to the existing habits and customs of the people. But still, in order to be exempt under this clause of the statute, the article must be such as can be fairly denominated household furniture. So of other clauses of the statute, the property in order to be exempt must be of the kind or class mentioned in the statute, however convenient it may be for the debtor.

The article in question in this case, it is true, takes the place of a tool that is exempt, but that is not sufficient, as the reason is true of almost all machinery, however expensive and complicated. If the introduction of machinery to supersede the use of tools has produced such change in the mode of labor as to render it expedient to protect from attachment articles of the class to which the one in question belongs, it is for the legislature and not for the court to provide the remedy.

The ruling of the county court was correct, and the judgment is affirmed.

TOOLS.—The meaning of the word "tools," and what implements are included in that term as used in the exemption statutes, is discussed in the case of *Garrett v. Patchin*, 70 Am. Dec. 414, and the cases in the note thereto. In *Allen v. Thompson*, 45 Vt. 472, it was held that a barber's chair and foot-rest, used by a barber in his business, are exempt from attachment as tools, "necessary for upholding life."

RIKER v. HOOPER.

[25 VERMONT, 457.]

IN SUITS TO RECOVER FORFEITURE, RULE OF EVIDENCE IN CRIMINAL CASES APPLIES, that all the facts material to sustain the suit must be proved beyond a reasonable doubt.

FORMER JUDGMENT BETWEEN TWO PARTIES IN CIVIL SUIT IS NOT CONCLUSIVE between them in a subsequent penal suit, although exactly the same question is in dispute, as the rules of evidence governing such cases are different.

JUDGMENT, IN ACTION OF TROVER brought by one whose animal had been impounded, against the impounder, that the former had been legally notified under the statute of the impounding of his animal, is not even *prima facie* evidence of the sufficiency of such notice in an action by the impounder to recover the penalties and forfeitures provided for in the statute.

WHERE THERE IS NO SUFFICIENT POUND IN TOWN, the person taking the animal up may impound it in his own barn, or in the inclosure of some other person.

ACTION FOR EXPENSES OF KEEPING IMPOUNDED ANIMAL, and for the penalty provided for in the statute, in a town where there is no public pound, where the person who impounds the animal places it in the barn of the public pound-keeper elected by the town, because he was pound-keeper and in his official capacity, and where the impounder had never paid anything, or agreed to pay anything for the costs of keeping, must be brought by the pound-keeper, and not by the impounder.

FORFEITURES PROVIDED IN STATUTE RELATING TO IMPOUNDED ANIMALS DO NOT INCLUDE the expenses of keeping the animal impounded. But both may be recovered in the same suit.

LIMITATION OF NINE MONTHS DOES NOT APPLY to actions for forfeitures and expenses under the statute relating to impounding animals.

CASE founded upon the statute relating to pounds,—chapter 92, section 10, of the Compiled Laws.

Peck and Colby, for the defendant.

Dewey and Underwood, for the plaintiff.

By Court, ALDIS, J. This is a suit to recover a forfeiture, and therefore the rule of evidence in criminal cases applies, that all the facts material to sustain the suit must be proved beyond a reasonable doubt. One material fact is, that the plaintiff gave notice to the defendant of the place where the defendant's horse was impounded: Comp. Stat., c. 92, sec. 8. Without such notice, the impounding and the detention of the horse were illegal, and the forfeiture and expense of keeping cannot be recovered. To prove this notice, the plaintiff showed that the defendant had sued him in trover for the detention of the horse in the pound; that on the trial of that case, the present defendant contended that the impounding was illegal, upon the ground that the notice did not state where the horse was

impounded; that the judgment was for the present plaintiff,—and the plaintiff offered the record of that judgment, in connection with proof of the above facts, to show that his proceedings in impounding the horse, and in giving the notice where he was impounded, were legal. To this the defendant objected, but the evidence was admitted. The defendant then offered to show that the plaintiff did not give him any notice of where the horse was impounded. This was objected to by the plaintiff, on the ground that the judgment in trover had conclusively settled the question of the legality of the notice, and that the parol evidence on the part of the defendant was not admissible to show that the notice was not legal. The court held the record conclusive, and excluded the parol evidence.

The objection to this ruling is, not that the very point was not there litigated between the same parties, but that that action being a civil suit, the jury might have found the fact upon the mere preponderance of evidence, and that they might not have so found if they had been required to have been satisfied of it beyond a reasonable doubt, and therefore that their verdict, resting upon such inferior amount of evidence, ought not to be held conclusive or admissible in this penal action.

We think the objection stands on solid grounds. All who are conversant with courts must have observed that juries will render verdicts in civil cases upon light evidence,—the mere balance of probabilities,—when in criminal cases nothing would induce them to so decide. The law justifies them in so doing. The distinction is an important one, and leads to widely different results. To admit the judgment in trover as conclusive here, might operate to deprive the defendant of the right to have the rule of full proof in criminal cases applied to his case. But we do not think it admissible even as *prima facie* evidence of the legality of the notice. For to hold this would be to require the defendant to establish by proof on his own side that the notice was not legal, before the fact had been established on the other side by the requisite legal proof, viz., proof beyond a reasonable doubt: See 1 Greenl. Ev., sec. 537, and cases cited.

2. The statute provides that if there is no pound in a town, any person in such town may impound “in his own barn, or in some other inclosure,” notifying the owner where his beast is impounded. The defendant contends that the impounder must impound “in his own barn, or in some other inclosure” of his own, and that the impounding in Moses Hatch’s barn was illegal.

This is untenable. The language of the act does not require, but rather excludes the construction. The person wishing to impound might have no other inclosure of his own than the field in which the beast was taken damage-feasant.

3. Moses Hatch was pound-keeper, and the plaintiff testified he impounded the horse with him because he was pound-keeper; that Hatch had kept the horse; and that the plaintiff had never paid or agreed to pay anything for keeping. He here sues for the expense of keeping, and for the forfeiture incurred by the owner for not replevying or redeeming.

The defendant insisted that he had the right to go to the jury upon the question whether the plaintiff impounded the horse with Hatch as pound-keeper, and in his official character; and claimed that the plaintiff could not sustain the action, which was given by statute to "the pound-keeper." The court held that though the plaintiff did impound with Hatch "as pound-keeper," still the plaintiff could recover, and directed a verdict for the plaintiff. This must have been upon the basis that where there is no public pound, the pound-keeper of the private pound is not strictly pound-keeper, but merely agent of the impounder, and he the pound-keeper.

If the impounder had acted himself as pound-keeper, by impounding the beast in his own barn, or if he had procured some other inclosure, and had employed some other person as his servant or agent to keep and feed the beast for him, then he would have been pound-keeper *pro hac vice*, and entitled to recover the expense of the keeping, which he had thus incurred or become liable for, and the forfeiture which the law gives as compensation to him who is obliged to keep the animal an unreasonable time. But it appears in this case that the plaintiff impounded the horse with Hatch (the public pound-keeper elected by the town) because he was pound-keeper, and in his official capacity, and that the plaintiff had never agreed to pay, and never had paid anything for costs or keeping. Without saying that Hatch was bound to receive the horse as pound-keeper, when there was no public pound, yet if he waived that question, and did consent to receive and keep him as pound-keeper, we think he must stand upon his rights, and be bound by his duties as pound-keeper, the same as if he had impounded the beast in a public pound. He would not be the servant or agent of the impounder. The impounder would have no greater rights than if he had impounded in the public pound. The owner of the beast would be justified in

dealing with the pound-keeper as acting in his official capacity. Our statutes have altered the common law as to pounds and impounding in several important particulars.

At common law, animals impounded in the common pound were to be fed by their owners, and hence the common pound was always a pound overt having a back wall and yard where the owner might go and feed them without offense. So its oversight was committed to the steward of the leet, "who," it was said, "should be a barrister of learning and ability." No notice need be given to the owner of the impounding of his beasts in the common pound.

But by our statute, the pound-keeper elected by the town at March meeting has charge of the pound, is bound to receive animals and keep them, and supply them with food and drink, and the owner is entitled to notice of the impounding.

At common law, if the impounding was not in the common pound, but in a special pound overt, the owner was entitled to notice, and then he was to supply food. If the impounding was in a special pound covert (such as a barn or other inclosure where the owner could not have access to his animals to feed them without offense), then the impounder was to give notice and feed them at his peril. Our statutes have thrown the duty of supplying the animals with food upon the pound-keeper, and makes him liable to the owner for all damages arising from his neglect of his duty.

As the pound-keeper is thus made by law the passive custodian of the beasts impounded, and must supply their food,—as he cannot let them go, on one hand, nor redeem or replevy them on the other,—it is obvious that, through neglect of the owner to either redeem or replevy, the animals might be left a long and unreasonable time in the pound, the keeper put to great expense, and the pound in time be overrun by the number of animals impounded.

Hence prompt and summary action is the rule of the impounding law.

The impounder must give notice to the owner within twenty-four hours. The owner must redeem or replevy his animals within forty-eight hours after notice or forfeit seventeen cents per day for each beast he suffers to remain in pound, "and pay all legal charges to the pound-keeper, which forfeiture," in the words of the statute, "shall be recovered by the pound-keeper for his own use, in an action on the case."

These provisions of the statute are plainly intended to oblige

the owner to act promptly on the question whether he will contest the unlawfulness of impounding by replevying the property, or will yield to it and redeem. Delay on this point might embarrass the pound-keeper, by leaving upon his hands many animals which he ought not to be obliged to keep, and whose increasing numbers might become a burden and nuisance to him. It might involve him (and the impounder, if liable in the first instance) in great and needless expense. It is reasonable that the owner, who, by replevin, can protect all his legal rights, should take and keep his own animals. If he replevy, he is not bound to pay the costs and legal charges of impounding in order to get back his property, but they are taxable against him in the replevin suit, if the impounder recover: See chapter on replevin, Comp. Stat., p. 268, sec. 7. If he redeem, he thereby admits the impounding lawful, and must pay the costs, charges, and damages: *Id.*, c. 92, sec. 8. Such being the rights of the owner, if he neglect to replevy or redeem, he is in the wrong. His neglect increases costs and expenses,—delays the settlement of the wrong complained of, whereas it should be settled while the damage and injury are recent and easily shown, and encumbers the pound with animals that ought to be in their owner's keeping. Thus, if he delays for more than forty-eight hours after notice, he becomes liable to the pound-keeper for the forfeiture and legal charges, and the pound-keeper may sue him therefor at any time. "The legal charges," include the expense of keeping, and he is thus made directly liable therefor to the pound-keeper. The statute, in providing that the pound-keeper may recover therefor in his own name, intends that he shall bring the action who is entitled to the forfeiture, and thus excludes the impounder, unless he becomes pound-keeper.

In this case, as the evidence tended to show that the impounder did not intend to be the pound-keeper, but on the contrary applied to the pound-keeper, as such, to take and keep the horse, we should be required, in order to make him pound-keeper, to hold that in all cases where there is no public pound in a town, the impounder must of necessity be regarded as pound-keeper, and cannot by applying to the official pound-keeper relieve himself from the duties of the office. We do not think that this would be consistent with the spirit or policy of our statutes. The exclusion of the evidence we deem erroneous.

The defendant also contended that the forfeiture was in full for the costs of keeping.

The language of the statute, that "he shall forfeit seventeen cents," etc., "and pay all legal charges," etc., fairly implies that the legal charges shall be in addition to the forfeiture. The old statute of March 2, 1787, from which this is taken, is explicit: "He shall forfeit seventeen cents," etc., "besides paying all necessary charges to the pound-keeper, for giving meat and drink to such creatures."

The defendant also claims that in this suit nothing can be recovered but the forfeiture. The right to sue for the expense of keeping arises from the liability of the pound-keeper as created by statute; hence, when the facts requisite by statute to raise the liability exist, the pound-keeper may sue. So, too, of the forfeiture,—it is created by statute. These rights of action need not be coupled together. Still, where both exist, and the facts which gave rise to them are all set forth in the declaration, and both are there claimed as substantive grounds of recovery (as in this case), we see no objection to having damages for both included in the verdict. The defendant cannot complain if the plaintiff sees fit to include his claim under the statute for the expense of keeping in his penal suit to recover for the forfeiture, and so subject himself to the stricter rule of full proof to sustain his declaration.

The defendant further claimed that all claim for forfeitures prior to nine months before suit brought were barred by the limitation in section 23 of the statute: "Every prosecution for a fine, under the provisions of this chapter, shall be commenced within nine months after the offense is committed, and not after."

But this provision, we think, applies only to fines proper, named in the chapter,—such as fines for rescue, pound-breach, named in the two sections next preceding the twenty-third section, and others named in the chapter. Such fines go into the public treasury. The forfeitures named in the act go to the party aggrieved, and not to the town. The forfeitures under the tenth section might extend over more than nine months of time (as they do in this case), and be continuous in their character, and in substance but one forfeiture. Upon this construction, a suit every nine months would be necessary to give the pound-keeper redress.

The offenses, for which fines *eo nomine* are given, are not continuous, but complete when once committed, and should, if sued for, be promptly prosecuted.

Judgment affirmed, and case remanded.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CAMERON v. CAMERON.

[15 WISCONSIN, 1.]

STATUTE REQUIRING ADMINISTRATOR'S BOND TO BE "APPROVED" BY COUNTY JUDGE IS DIRECTORY MERELY, and the granting of letters without such approval in form, is at most but an irregularity, which can only be taken advantage of by appeal from the order.

DECEASE IS NOT EVIDENCE AGAINST STRANGER TO RECORD.

DEPOSITION OF COMPETENT WITNESS AT TIME IS NOT RENDERED INADMISSIBLE by his subsequent marriage before the trial with the administratrix, on whose behalf the deposition was taken, where the cause for taking it still existed.

OBJECTIONS CANNOT BE URGED IN SUPREME COURT TO DEPOSITION for the want of sufficient notice, and of a proper certificate by the magistrate, when the objections were not made in the court below.

OBJECTION TO DEPOSITION FOR WANT OF SUFFICIENT NOTICE IS WAIVED by cross-examination.

ADMINISTRATOR IS NOT ACCOUNTABLE TO ESTATE FOR RENTS RECEIVED BY HIM FROM LANDS which did not belong to the decedent, but which were improperly included in the inventory and appraisalment.

INVENTORY IS NOT CONCLUSIVE FOR OR AGAINST ADMINISTRATOR, but is open to denial or explanation.

EVIDENCE TO IMPEACH STIPULATION IN POSSESSION OF ADVERSE PARTY OUGHT TO BE AS CLEAR AND UNEQUIVOCAL as that required to establish mistakes in such instruments, and the rule is that mistakes therein must be established beyond a reasonable doubt.

ESTATE IS NOT CHARGEABLE WITH EXPENSES OF ADMINISTRATRIX IN SUIT BROUGHT BY HER in her individual capacity, for the purpose of establishing the right of the intestate to lands, in order that she might have dower therein as his widow.

ESTATE IS NOT CHARGEABLE WITH EXPENSES OF ADMINISTRATRIX IN DEFENDING SUIT BROUGHT AGAINST HER by the heir to remove her from the administration, on the ground that she obtained the appointment by

a fraudulent representation that she was the widow of the intestate, and which suit was compromised, upon her concession that she had no right to the estate, and would resign her office.

ESTATE IS NOT CHARGEABLE WITH EXPENSES AND SERVICES OF Co-ADMINISTRATOR IN SUIT in which he made no defense, and where it was a matter of no interest to him, as administrator, whether the suit was successful or not.

ADMINISTRATOR'S ACCOUNT NEED NOT BE MADE UP IN ITEMS of days and half days spent in performing services. If the time actually devoted to the affairs of the estate be clearly proved, that will be sufficient.

APPEAL by Daniel Cameron, Sen., the father and heir at law of Peter Cameron, deceased, from an order of the circuit court confirming the report of the referee, to whom the final account of Emma Cameron and Cyrus K. Lord, administrators of the estate of Peter Cameron, had been referred. The referee admitted in evidence Lord's administration bond, although it was not indorsed "approved" by the county judge. The referee also admitted the records of two suits. One suit was brought by Emma Cameron against Daniel Cameron, Jr., in which the plaintiff alleged that certain conveyances made on September 18, 1850, and March 25, 1852, by Peter Cameron to the defendant, his brother, were made in trust for the grantor; that the lands belonged, therefore, to his heirs, and that the plaintiff, as his widow, was entitled to their use during her life; and prayed that the defendant might be decreed to release the lands to the heirs. The other suit was brought by Daniel Cameron, Sen., against Emma Cameron and Cyrus K. Lord, in which the plaintiff alleged that he was the heir of Peter Cameron; that the defendant Emma Cameron had fraudulently procured letters of administration to be issued to herself and the defendant Lord, by representing herself to be the widow of the decedent; that Lord had left the entire management of the estate to Emma Cameron, who had wasted portions of it; and prayed for an injunction to restrain the defendants from further interfering with the assets of the estate. A decree was afterwards entered by consent in the first case, to the effect that the lands described were lawfully conveyed to Daniel Cameron, Jr., free from any trust; and in the second case, that Emma Cameron had no right, as the widow of Peter Cameron, or otherwise, to his estate, as against the plaintiff; that she should execute to the plaintiff a release of all his real estate, except certain portions which the plaintiff was to release to her; that she should account, as administratrix, to the proper tribunal; and that she should be allowed,

out of the funds in her hands, "all just expenses of administering said estate, and the moneys which she has expended in paying just debts of said estate, and in addition thereto, the sum of eleven hundred dollars, in lieu of any claims which she may have upon said estate as widow or heir." The stipulation upon which the decrees were based was dated January 13, 1857. There was also read in evidence another stipulation, bearing the same date, in which it was recited that the plaintiff had conveyed to the defendant Emma Cameron, in satisfaction of her claims, certain real estate, and had also agreed that she might retain such sums of money that had been before allowed to her by the probate judge; that he would pay her such further sums as would make eleven hundred dollars; and that Emma Cameron should resign as administratrix, filing and settling her accounts, and should claim "no remuneration for her services as administratrix, and no allowance whatever for any disbursements or expenses made or incurred in or about any suits brought by her, or defended by her, in reference to the said estate, or for any expenses or disbursements, saving the ordinary expenses of administration, funeral expenses," etc. A question was raised as to whether this latter stipulation had been abandoned, and the stipulation on which the decrees were based executed in its place. The referee admitted the deposition of one Ralph C. Bowles, taken on behalf of Mrs. Cameron and Lord, when Bowles was about to leave the state without expecting to return, although it appeared that Bowles afterwards married Mrs. Cameron, but was still living at the time of the hearing, without the state. The controversy concerning certain allowances appears from the opinion.

Hugh and Alexander Cameron, for the appellant.

Lyndes and Losey, contra.

By Court, DIXON, C. J. The administration bond of the respondent Lord was properly received in evidence. The statute requiring the approval of the county judge is directory, and his omission did not deprive him of jurisdiction. The granting of letters without such approval in form was at most but an irregularity, which could only be taken advantage of by appeal from the order.

The record in the case of *Emma Cameron v. Daniel Cameron, Jr.*, was improperly admitted. As evidence that the title of the lands in controversy in that action was not in the re-

spondents' intestate, it was inadmissible for the reason that the appellant and heir at law was not a party, and the action was prosecuted by Emma Cameron in her individual and not in her representative capacity. The appellant therefore could not be bound, nor his rights affected, by the judgment. It was inadmissible for the purpose of charging the estate with the expenses incident to that litigation, for reasons which will presently be more fully noticed.

The referee was correct in allowing the deposition of the witness Ralph C. Bowles to be read. He was a competent witness at the time his testimony was given, and his subsequent marriage with Mrs. Cameron did not affect that testimony, the cause for taking the deposition still existing. If the cause for taking the deposition had been removed, and he had been offered as a witness at the trial, the objection that he was then incompetent would have presented a very different question. The objections for the want of proper notice of the time and place of taking the deposition, and of a proper certificate by the magistrate, do not appear to have been made before the referee, and therefore cannot now be urged. That, for want of sufficient notice, was waived by the appearance and cross-examination of the appellant's counsel: *Miller v. McDonald*, 13 Wis. 678.

The moneys received by Mrs. Cameron for rent of lots owned by Daniel Cameron, Jr., are not proper charges in favor of the estate, and the referee was right in rejecting those items. The conveyances of September 18, 1850, and March 25, 1852, from Peter Cameron to Daniel Cameron, Jr., show title in the latter, and that the former was not seised at the time of his death. The lands thus conveyed were, therefore, improperly included in the inventory and appraisements of assets, and it was competent for Mrs. Cameron to avoid her *prima facie* liability by showing the facts. The inventory is not conclusive either for or against the administrator, but is open to denial or explanation: *Willoughby v. McCluer*, 2 Wend. 608. Mrs. Cameron is answerable to Daniel Cameron, Jr., for the rents, and ought not to be charged twice, or to account to the estate for what never in fact belonged to it.

All the items and charges for Mrs. Cameron's personal services as administratrix, and for expenses in and about the two suits,—that above named, and that of *Daniel Cameron, Sen., v. Emma Cameron*, *Cyrus K. Lord*, and *Angus Cameron*,—should have been rejected. If the terms "all just expenses of

administering said estate," in the decree and stipulation in the latter action, can be construed to include charges for personal services, which seems doubtful, the other stipulation of the same date, which, or a copy, was designed to be filed in the probate court, as the basis of proceedings to be had therein, shows very clearly that no pay for such services was to be demanded. The last stipulation is very explicit upon this point, it being expressly provided that in the filing and settlement of her accounts, she was to claim "no remuneration for her services as administratrix, and no allowance whatever for any disbursements or expenses made or incurred in or about any suits brought by her, or defended by her, in reference to the said estate, or for any expenses or disbursements, saving the ordinary expenses of administration, funeral expenses," etc. The legal effect of the two stipulations is very nearly the same, and were we to reject the latter entirely, and place our decision alone upon the stipulation which constituted the basis of the decree, the result must be the same, except as to the items for personal services pertaining to matters other than the litigation of the two suits in question. Conceding that the fees of the administratrix were comprehended by the words "all just expenses of administering said estate," the specification of that item and the items for moneys expended in the payment of just debts against the estate, and the eleven hundred dollars in lieu of any claim which she might have as widow or heir, must, by a very familiar rule of construction, be held to operate as an exclusion of all other items and charges. In view of the situation of the parties, the nature of their controversies, and the settlement perfected, it cannot be supposed that they contemplated that the expenses of the litigation thus closed were to constitute a proper charge in favor of the administratrix against the estate. If such was the intention, they were certainly very unfortunate in the choice of language to express it.

But we think the evidence did not authorize the referee to disregard the stipulation designed for use in the probate court as the basis of settlement. The testimony of Mr. Lord, although it raises a strong suspicion that this stipulation was to have been surrendered and canceled, is not of that clear and positive character which the nature of the case requires.

He speaks very doubtfully upon the subject, and is directly opposed by Daniel Cameron, Jr., who says, positively, that it was executed and delivered at the same time with the stipulations upon which the decrees were founded, and as a part of

the same transaction. Evidence to impeach an instrument thus found in the possession of the adverse party ought to be as clear and unequivocal as that required by law to establish mistakes in such instruments. The rule in such cases is, that the mistake must be established beyond any reasonable doubt: *Lake v. Meacham*, 18 Wis. 355, and authorities there cited.

But if we are wrong in both these positions, still the estate ought not to be charged with the expenses of the suits, or Mrs. Cameron's time in attending to them. That against Daniel Cameron, Jr., was clearly prosecuted for Mrs. Cameron's sole benefit, and in no way connected with the affairs of the estate. She sued in her individual capacity, and the burden of her complaint, from beginning to end, was the injuries which she would sustain in respect to her dower, if Daniel Cameron, Jr., were permitted to set up his claims. It seems an idle waste of words to talk about that proceeding having been taken in behalf of the estate. The same is true of the action of Daniel Cameron, Sen., against herself and her co-administrators. She was charged with having intruded into the affairs of the estate upon the pretense that she was the widow of the deceased, and as such, entitled to administer,—with a sort of usurpation of the office of administratrix, which, though it was obtained according to the forms of law, was nevertheless fraudulent and illegal. She contested the action, but her co-defendants made no answer. By the stipulation and settlement, the claims of the plaintiff were substantially conceded, and she consented to retire from the office which she had thus obtained. It would be remarkable, indeed, if she could turn around and charge the estate or heir at law with the expenses of such litigation.

The charges of the respondent Lord, for expenses and services as administrator and counsel in the same action, should have been disallowed. They are not proper charges against the estate. He made no defense, and it was a matter of no interest to him, as administrator, whether Mrs. Cameron was successful or not. Aside from the litigation of those suits, which did not pertain to the administration, the case appears not to have been one of unusual difficulty or responsibility. Mr. Lord is, therefore, only entitled to compensation at the rate of one dollar per day for actual services in attending to the ordinary affairs of the estate, and to his actual and necessary disbursements for the benefit of the estate, according to the provisions of the statute: R. S. 1849, c. 131, sec. 8.

Though very correct and convenient in practice, it seems not to be indispensable that the account of the administrator should be made up in items of days and half-days spent in performing services. If the time actually devoted to the affairs of the estate be clearly proved, that will be sufficient: *Higbie v. Westlake*, 14 N. Y. 281.

The allowance by the referee of fifty dollars for the services of Ralph C. Bowles was, under the circumstances, reasonable and proper.

The administratrix was properly credited with the value of the property delivered over to Daniel Cameron, Jr., as her successor. That part of the order was not appealed from, or at least not contested.

The account of personal property which came to the hands of the administratrix is correct. She appears to have been charged with the full value, as shown by the inventory and appraisement.

As the items of services and disbursements for which the respondents are entitled to compensation, according to the principles settled by this opinion, are not distinguished by the proofs from those with which the estate cannot be charged, it may become necessary for the court to take further proof, or to recommit the case to a referee, in order that they may be ascertained. We see no objection to either course being pursued.

The order of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ADMINISTRATOR'S FAILURE TO GIVE BOND, EFFECT OF: See *Palmer v. Oakley*, 67 Am. Dec. 41; *Ex parte Maxwell*, 79 Id. 62, and note, where the question is considered, and the principal case cited.

JUDGMENT IS BINDING UPON PARTIES AND PRIVIES ONLY: *Detrick v. Migatt*, 68 Am. Dec. 584; *Whitney v. Higgins*, 70 Id. 748; *Liscomb v. Postell*, 77 Id. 651, and cases cited in the notes thereto.

DEPOSITION OF COMPETENT WITNESS AT TIME, WHETHER RENDERED INADMISSIBLE BY WITNESSES' SUBSEQUENT INCOMPETENCY: See *Mulford v. Minch*, 64 Am. Dec. 472; and see *Ables v. Miller*, 62 Id. 520.

NOTICE OF TIME AND PLACE OF TAKING DEPOSITION TO BE GIVEN: Note to *Kelly v. Benedict*, 39 Am. Dec. 530; *Athwood v. Fricot*, 76 Id. 567; compare *O'Neill v. Henderson*, 60 Id. 568.

OBJECTION TO DEPOSITION FOR WANT OF NOTICE IS WAIVED BY CROSS-EXAMINATION OF WITNESS: *Kelly v. Benedict*, 39 Am. Dec. 530; and see *Hunt v. Cram*, 69 Id. 331; so also it is waived by the party's joining in the commission, and submitting cross-interrogatories: *Benham v. Purdy*, 48 Wis. 100, citing the principal case.

PERSONAL REPRESENTATIVES, WHEN ALLOWED COSTS AND EXPENSES OF SUITS BROUGHT BY AND AGAINST THEM: See *Turnham's Ex'rs v. Shouse*, 33 Am. Dec. 473; *Chase v. Lockerman*, 35 Id. 277; *Compton v. Barnes*, 45 Id. 115; *Pelham v. Taylor*, 59 Id. 604; *Bendall's Distributees v. Bendall's Adm'r*, 60 Id. 469; *Henderson v. Simmons*, 70 Id. 590; *McClellan v. Hetherington*, 73 Id. 89; *Craft v. Snook's Ex'rs*, 78 Id. 94, and the cases in the notes thereto.

GANSON v. MADIGAN.

[15 WISCONSIN, 144.]

MANUFACTURERS CANNOT RECOVER CONTRACT PRICE OF REAPER, but are entitled to compensation for any actual loss or expense incurred by them in consequence of the defendant's refusal to accept a reaper, if the reapers manufactured were such as the contract of the parties called for, and the manufacturers were ready and willing to perform the contract on their part, where the plaintiffs agreed to manufacture a reaper of a certain kind, and to deliver it to the defendant at a certain time and place, and at the appointed time and place the defendant was shown the separate pieces of a number of reapers, of identical form and size, and was told that one was designed for him, and would be put up for him if he would take it, but he refused. There was not such a delivery as vested the title in the defendant.

EXTRINSIC EVIDENCE OF SURROUNDING FACTS AND CIRCUMSTANCES IS ADMISSIBLE TO EXPLAIN MEANING OF WORD "TEAM," in a contract under which a reaper was to be furnished, "capable, with one man and a good team, of cutting and raking off and laying in gavels for binding, from twelve to twenty acres of grain in a day," although the ambiguity is patent; and therefore the declarations of the agent of the manufacturer, made to the buyer at the time of entering into the contract, as to the amount of power which the machine would require, are admissible; but similar declarations, made about the same time, by the same agent, to another person, on entering into a similar contract, are inadmissible, as not being a part of the *res gestæ*.

CONSTRUCTION OF WRITTEN INSTRUMENT IS USUALLY FOR JURY, if its meaning is to be judged by extrinsic evidence.

JUDGMENT WILL NOT BE REVERSED FOR ADMISSION OF IMPROPER EVIDENCE, where, if it had been rejected, the verdict must have been the same.

ACTION to recover the price of a reaper. The defendant, Madigan, signed an order requesting the plaintiffs, Ganson, Huntley, & Co., to manufacture and deliver to him, at Milwaukee, to the care of Wells & Co. or Dousman & Co., on or before July 1, 1855, one of Palmer and Williams' patent self-raking reapers, "warranted to be well made, of good materials, and not liable to get out of order with careful usage, and to be capable, with one man and a good team, of cutting and raking off and laying in gavels for binding, from twelve to twenty acres of grain in a day," for which the defendant was

to pay fifty dollars, besides storage, freight, and charges, on delivery, and \$110 on December 1, following; the order concluding with: "If, upon a fair trial to be made next harvest, said reaper cannot perform as specified, the undersigned will store it safely, and deliver it to Ganson, Huntley, & Co., or their agent, subject to refunding the fifty dollars, paid as above." The plaintiffs, before the 1st of July, sent to Dousman & Co. about twenty reapers of the exact description mentioned in the order, but they were shipped in pieces. One of these machines was intended for the defendant, and he was notified that it was at Dousman & Co.'s, ready for him. The defendant thereupon went to Dousman & Co.'s, and asked if they had a reaper for him, to which they replied that there was a reaper there for him, or for a man of his name. The defendant asked Dousman & Co. to show him a reaper with his name on it, but they said that there was none marked with his name, and told him that he might pick out one. The defendant asked to see a reaper set up, but Dousman & Co. refused to set up one, unless the defendant would agree to take it. The defendant refused to take one of the reapers, giving as a reason that they were too heavy, and were for four horses instead of for two. The defendant testified that the agent of the plaintiffs, who obtained the order from him, declared to him at the time that one span of horses, such as the defendant owned, would work the machine up to the warranty. One Gunn also testified on behalf of the defendant that he had ordered a reaper of the same kind, a short time before, through the same agent, who informed him at the time he took the order that the machine could be used with two horses. The agent, one Chase, testified that he thought the defendant had said that he had but one team, and that he told the defendant that one good team would work the machine. The court instructed the jury that they were to construe the term "a good team"; that if the plaintiffs delivered a machine according to agreement, they were entitled to recover whatever damages they had sustained by the defendant's refusal to receive, and the measure of damages was the difference between the contract price and the value of the reaper on July 1, 1855; and that if the machine did not answer the terms of the order as to capacity and power, the defendant was not obliged to take it, it being a condition precedent to the reception of the machine and the payment of the fifty dollars mentioned in the order, that the plaintiffs should manufacture and deliver, or offer to deliver, a machine of the

power and capacities designated in the order. The plaintiffs requested instructions, which were refused, to the effect that if the plaintiffs fulfilled the contract on their part, by the manufacture of a reaper as called for by the contract, and the delivery of the same to Dousman & Co., on or before July 1, 1855, the plaintiffs were entitled to recover the contract price, with interest; that it was not necessary that the plaintiffs should mark or set apart any particular reaper for the defendant, to entitle them to recover the contract price; and that if the plaintiffs, on or before July 1, 1855, delivered to Dousman & Co., for the defendant, a reaper of the kind ordered, and such as called for by the contract, the title to the reaper so delivered vested in the defendant. The defendant had a verdict and judgment.

Conger and Hawes, for the appellants.

Smith and Ordway, for the respondent.

By Court, DIXON, C. J. In cases like this, we fully concur with Judge Bronson in saying that "it is an elementary principle that an erroneous decision is not bad law,—it is no law at all"; and could we become satisfied that our last decision (*Ganeon v. Madigan*, 13 Wis. 67) was in this unfortunate predicament, or was an unauthorized *dictum*, we should have been with alacrity to retrace our steps. Subsequent investigations have only confirmed the views which we there took of the law.

The rights and liabilities of the parties under the contract were, in substance, these: The plaintiffs were bound to manufacture and deliver the machine in the manner specified, at the city of Milwaukee, on or before the first day of July. The defendant was bound, on the same day (or before, if notified of its earlier delivery, and he chose to do so), to be present to receive it, and pay the fifty dollars and the storage. The obligation of the plaintiffs to manufacture and deliver, and that of the defendant to be present and receive and pay, were mutual and concurrent. The presence of both parties, by themselves or agents, at the time and place designated, was necessarily contemplated, since the obligations resting upon them respectively could not otherwise be discharged. The plaintiffs, if they had manufactured and furnished ready for delivery by their agents at Milwaukee, such a machine as the contract called for, would have so far performed the duty imposed upon them as to be entitled to damages for the defendant's violation of duty in neglecting to be

present, accept, and pay the sums stipulated. For this purpose it was not necessary for them to set apart the machine, so as to vest the title in him subject to their lien for the purchase-money and charges. Having manufactured and forwarded the machine upon the faith of his promise to receive and pay for it, it would be most unreasonable and unjust to say that they should not have compensation for any actual loss or expense which they had thus incurred. The defendant, by his failure to appear and perform the contract on his part, would have been in no situation to insist upon an actual delivery or separation of the machine. Delivery and payment were concurrent acts, the one dependent on the performance of the other, and the neglect of the latter effectually excused the former. It would have been enough to have enabled the plaintiffs to recover their actual loss and expenses, if they had shown that they were ready and willing to perform the contract on their part: Chitty on Contracts, 633. As stated by Mr. Parsons (2 Parsons on Contracts, 484), they had, under the circumstances, three courses open to them: to consider the machine as their own (which they did by not setting it apart, so as to constitute a delivery), and sue for the damages occasioned by the non-acceptance; or to consider it as the defendant's (which they might have done by separating it from the others, so as to be capable of identification), and sell it, with due precaution, to satisfy their lien on it for the price, and then sue and recover only for the unpaid balance of the price; or in the latter case, also, to hold it subject to the defendant's call or order, and then recover the whole price which he agreed to pay. We deem these principles to be sound and well supported by the authorities, and are willing to stand by them. The rule of damages given by the court below was therefore correct, and the judge was right in refusing the instruction asked by the appellants on that subject.

The case is clearly distinguishable from those in which the counsel suppose a different rule was established. They will all be found, on examination, to have been cases where the articles purchased or manufactured were, from their nature, susceptible of being distinctly known and identified, or where they were set apart by the vendors, so that the vendees, on paying the price, could receive and dispose of them if they desired. Such was the case of the wood-work of the wagon, in *Crookshank v. Burrell*, 18 Johns. 58 [9 Am. Dec. 187]; the

carriage, in *Mixer v. Howarth*, 21 Pick. 205 [32 Am. Dec. 256]; the sulky, in *Bement v. Smith*, 15 Wend. 493; and the promissory note, in *Des Arts v. Leggett*, 16 N. Y. 582. As was decided in the last case, the vendor, choosing to go for the price, becomes, after a valid tender of the chattel in performance of the contract, a bailee for the vendee. But we know of no principle of law which would allow the vendor to keep the goods as his own, and at the same time come upon the vendee for the price,—compel the latter to pay for, and yet not get the property,—which would be the case were the present plaintiffs to be permitted to recover the price, irrespective of the amount of damages which they had sustained in consequence of the defendant's non-acceptance. The machine here was brought to Milwaukee in pieces, its several parts separated and packed with those of a great number of other machines of identical form and pattern, so that the same part of one machine was equally suited to every other. It remained in this condition until after the day fixed for its delivery and acceptance. It is idle, therefore, to talk about there having been such a delivery as would have vested the title in the defendant, provided the jury had found that the machine was such as the contract called for. The property in all the machines remained in the plaintiffs, subject to their absolute dominion and right of disposal. Nothing could have changed it as to the defendant, short of a separation or distinct ascertainment, by mark or otherwise, of the machine intended for him, so that he could afterwards, on paying the price, have obtained it if he chose.

If the defendant's had been the only contract for a machine to be delivered in Milwaukee, and his the only machine delivered, or if it had been unlike all the others, the question would have been very different. The authorities cited by counsel would then have afforded some foundation for their position.

And here we may correct another mistake on the part of the counsel. They seem to suppose that the delivery of several machines in Milwaukee, in whatever form, so that one could have been obtained by the defendant within the time prescribed, was all that was necessary under the contract to pass the title; and that this court so decided when the cause was here for the first time: 9 Wis. 146. But this was not so. The delivery there spoken of was a delivery in the general sense of bringing the machine to Milwaukee, in pursuance of the contract, so as to entitle the plaintiffs to recover damages for the

defendant's non-acceptance,—not that specific delivery made necessary by law to transfer title. The contract of the defendant was distinct and independent of that of every other person, and a compliance with its terms as well as the law required a distinct and independent delivery, in order to vest the title in him. He never agreed to receive his machine in fragments, commingled with those of the machines of a hundred other persons, in such manner that nothing could be identified. The way in which the machines came to the hands of the consignees was the plaintiff's fault, or at least, not the fault of the defendant.

The word "team," as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six, or even more of either kind of beasts. We look upon the contract, and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible, and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject-matter in contemplation at the time. It is an uncertainty arising from the indefinite and equivocal meaning of the word when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. The question is, Can extrinsic evidence be received to explain it? We think it can. There is undoubtedly some confusion in the authorities upon this subject, especially if we look to the earlier cases; but the later decisions seem to be more uniform. As observed by Chancellor Desaussure, in *Dupres v. McDonald*, 4 Desaus. Eq. 209, the great distinction of *ambiguitas latens*, in which parol evidence has been more freely received, and *ambiguitas patens*, in which it has been more cautiously received, has not been sufficient to guide the minds of the judges with unerring correctness; some of the later cases show that there is a middle ground, furnishing circumstances of extreme difficulty. Judge Story was of opinion (*Peisch v. Dickson*, 1 Mason, 11), that there was an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, and comprising those instances where the words are equivocal, but yet admit of precise and definite application by resorting to the circumstances under which the instrument was made, in which parol testimony was admissible. As an example, he put the case of a party assigning his freight in a particular ship by

contract in writing; saying that parol evidence of the circumstances attending the transaction would be admissible to ascertain whether the word "freight" referred to the goods on board of the ship, or an interest in the earnings of the ship. This distinction seems to be fully sustained by the later authorities, and we can discover no objection to it on principle: *Reay v. Richardson*, 2 Crompt. M. & R. 422; *Hall v. Davis*, 36 N. H. 569; *Emery v. Webster*, 42 Me. 204 [66 Am. Dec. 274]; *Baldwin v. Carter*, 17 Conn. 201 [42 Am. Dec. 735]; *Drake v. Gores*, 22 Ala. 409; *Cowles v. Garrett*, 30 Id. 348; *Waterman v. Johnson*, 13 Pick. 261; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Jennings v. Sherwood*, 8 Conn. 122; 1 Greenl. Ev., secs. 286-288. The general rule is well stated by the supreme court of New Hampshire, in *Hall v. Davis*, 36 N. H. 569, as follows: "As all written instruments are to be interpreted according to their subject-matter, and such construction given them as will carry out the intention of the parties whenever it is legally possible to do so, consistently with the language of the instruments themselves, parol or verbal testimony may be resorted to, to ascertain the nature and qualities of the subject-matter of those instruments, to explain the circumstances surrounding the parties, and to explain the instruments themselves by showing the situation of the parties in all their relations to persons and things around them. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments, boundaries, or lines, to several writings, or the terms be vague and general, or have divers meanings,—in all these and the like cases, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect; and this without any infringement of the general rule, which only excludes parol evidence of other language, declaring the meaning of the parties, than that which is contained in the instrument itself."

If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time, of their understanding of them, ought not to be excluded. And so it was held in several of the cases above cited: *Reay v. Richardson*, 2 Crompt. M. & R. 422; *Emery v. Webster*, 42 Me. 204 [66 Am. Dec. 274]; *Waterman v. Johnson*, 13 Pick. 261. Such declarations, if satisfactorily established, would seem to

be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial.

And though in general the construction of a written instrument is a matter of law for the court,—the meaning to be collected from the instrument itself,—yet, where the meaning is to be judged of by extrinsic evidence, the construction is usually a question for the jury: *Jennings v. Sherwood*, 8 Conn. 122, and other cases above. The circuit judge was therefore right in receiving parol evidence to ascertain the sense in which the word was used by the parties, and in submitting that question to the decision of the jury.

But he was clearly wrong in receiving evidence of the statements of the plaintiffs' agent to the witness Gunn at the time of making the contract with him. The occasions were different,—the two contracts entirely disconnected, and though both concerned a machine of the same pattern and manufacture, yet what was said in the one case was not a part of the transaction in the other. It was no part of the *res gestæ*. If the agent Chase, in negotiating with Gunn, had made an admission of his representations to the defendant, evidence of such admission could not have been received: *Milwaukee & Miss. R. R. Co. v. Finney*, 10 Wis. 388. It would be going much too far were we to hold that it was proper to give the jury the agent's statement to Gunn, as evidence tending to prove that a similar statement was made to the defendant. If it has any such tendency, it is so remote that the law cannot lay hold of and apply it.

The question then comes up, Must the judgment, for this reason, be reversed? The defendant's counsel insist not;—that the evidence before the jury was sufficient without this, and if it had been rejected, the verdict must have been the same. We are inclined to take the same view. The defendant's testimony was clear and positive as to the kind of team,—that the agent said "one span of horses" would work the machine up to the warranty. In this he was not contradicted, but rather corroborated, by the agent, who was himself upon the stand. We would naturally expect, if the fact had been otherwise, the agent would have said so. On the other hand, he testifies very frankly that the defendant said he had but one team; and that he told him one good team would work the machine. The admission of the improper evidence could not, therefore, have affected the finding of the jury upon this point; and consequently the plaintiffs were not prejudiced by it.

We can hardly believe that the argument of the plaintiffs' counsel upon the construction of the warranty, that it referred to the capacity of the machine, without regard to the kind of team employed, and was satisfied if, under any circumstances, and with any number of horses, it could be made to perform as alleged, was urged with any real hope of success. Such a construction would be directly opposed to the manifest intention of the parties.

The jury, upon proper evidence, and under proper instructions, having found that the machine delivered at Milwaukee was not such as the contract called for, the judgment upon their verdict must be affirmed.

Ordered accordingly.

The principal case, as it came before the court at other times, is reported in *Ganson v. Madigan*, 9 Wis. 146; S. C., 13 Id. 67.

CHattel must be set apart and identified before property in it passes by sale: *Jewett v. Lincoln*, 31 Am. Dec. 36; *Arnold v. Delano*, 50 Id. 754; *Brainer v. Ansel*, 51 Id. 406; *Golder v. Ogden*, 53 Id. 618; and see the principal case cited on this point, in *Hoffman v. King*, 58 Wis. 318. If anything remains to be done by the parties, the title will not pass: *Hunt v. Thurman*, 40 Am. Dec. 693; *Williams v. Allen*, 51 Id. 709; *Messer v. Woodman*, 53 Id. 241; *Winslow v. Leonard*, 62 Id. 354, 356; *Nicholson v. Taylor*, 72 Id. 728. But a sale of chattels in bulk may pass the title without actual separation, when it is the intention of the parties: *Scott v. Wells*, 40 Id. 568; *Sakelman v. Mills*, 51 Id. 630; *Waldron v. Chase*, 59 Id. 56; *Winslow v. Leonard*, *supra*; *Horr v. Barker*, 70 Id. 791; *Swell v. Eaton*, Id. 471; *Kimberly v. Patchin*, 75 Id. 334; and see *Hoffman v. King*, *supra*, citing the principal case. An executed sale is one where nothing remains to be done by either party to effect a complete transfer of the subject-matter of the sale: *Smith v. Supervisors of Barron Co.*, 44 Wis. 692, citing the principal case.

VENDOR'S REMEDY IN CASE VENDEE REFUSES TO ACCEPT GOODS: See *Gilly v. Henry*, 13 Am. Dec. 291; *Mackinley v. McGregor*, 31 Id. 522; *West v. Cunningham*, 33 Id. 300; *McCombe v. McKennan*, 37 Id. 506; and see, further, on the measure of damages, *Coffman v. Hampton*, Id. 511. If a vendor has taken the steps necessary to vest the property in the goods sold in the vendee, he may sue for goods sold and delivered, and the measure of damages is the contract price: *Pittsburgh etc. R'y v. Heck*, 50 Ind. 305, 307; *Fell v. Muller*, 78 Id. 513; but if the vendor is ready and willing to perform on his part, and the property has not vested in the vendee, the measure of damages is the actual injury sustained, which is ordinarily the difference between the value of the property at the time of the refusal and the price agreed upon: Id.; and see *Nash v. Hoxie*, 59 Wis. 392, quoting and citing the principal case; and where a seller has been in no manner in fault, he is entitled to retain so much of the purchase price paid as is necessary to fully indemnify him for all the damages he may have suffered in consequence of the non-performance on the part of the purchaser: *Kane v. Jenkinson*, 10 Nat. Bank. Reg. 323, citing the principal case.

EXTRINSIC EVIDENCE IS ADMISSIBLE TO EXPLAIN DOUBTFUL MEANING OF TERMS OF CONTRACT: *Cooper v. Berry*, 68 Am. Dec. 468, and cases in

note; *Stroks v. Hartford F. Ins. Co.*, 33 Wis. 657, referring to the principal case. Thus it may be shown that the parties intended by the description "the south half of the fractional quarter," one half of the area of the quarter-section: *Prentiss v. Brewer*, 17 Id. 642, referring to the principal case. Such evidence is admissible to explain latent ambiguities in written instruments: *Sargent v. Adams*, 63 Am. Dec. 718, and note collecting prior cases; *Walker v. Wells*, 71 Id. 164; *Bowen v. Slaughter*, Id. 135; *Morgan v. Burroun*, 45 Wis. 217, citing the principal case. Evidence of the surrounding facts and circumstances is admissible: *Blossom v. Griffin*, 67 Am. Dec. 75, and note discussing the question; *French v. Hayes*, 80 Id. 127; *Farmers' Loan & T. Co. v. Commercial Bank*, post, p. 689. The principal case is an authority on this point, in *Rockwell v. Mutual L. Ins. Co.*, 21 Wis. 554; *Sydner v. Palmer*, 29 Id. 241; *Lyman v. Babcock*, 40 Id. 512; *Messer v. Oestreich*, 52 Id. 689. But in an action for the price of goods sold by sample, where the defense was that the goods were inferior to the sample, and unfit for use, it is error to admit evidence on the part of the plaintiff that other goods of the same kind were sent by him at the same time to other purchasers, who made no complaint of their quality: *Barton v. Kane*, 17 Id. 43; and in an action for the price of piling furnished by the plaintiff to the defendants under a verbal contract, to be used in constructing a bridge, direct evidence as to the terms of another and entirely independent contract between the defendants and a third party for furnishing piling for the same bridge, is not admissible on the part of the plaintiff for the purpose of establishing the terms of his own contract: *Pooley v. Rice*, 29 Id. 97, both citing the principal case.

CONSTRUCTION OF WRITTEN INSTRUMENT IS USUALLY FOR JURY, if the language is doubtful, or the intention not clearly expressed: *State ex rel. Attorney-General v. Conklin*, 34 Wis. 31; *Begg v. Begg*, 56 Id. 537, both citing the principal case.

BURNHAM v. CITY OF FOND DU LAC.

[15 WISCONSIN, 158.]

MUNICIPAL CORPORATION IS NOT SUBJECT TO GARNISHMENT.

ACTION brought by the plaintiff, as sheriff, to recover from the defendant the sum of \$325. The defendant had been garnished as the debtor of one Ryder, but had paid over the amount of the indebtedness to Ryder after the service of the garnishee process. A demurrer to the complaint was sustained for the principal reason that the defendant, being a municipal corporation, was not subject to garnishment.

Abbott, Gregory, Pinney, and Flower, for the appellant.

Charles A. Eldridge, for the respondent.

By Court, PAINE, J. The question in this case is, whether a municipal corporation is liable to be garnished for its debts to individuals. The question is very similar in principle to

that whether sheriffs or clerks of courts, and other similar officers, are liable to garnishment for moneys in their possession as such officers. And in the case of *Hill v. La Crosse and Milwaukee R. R. Co.*, 14 Wis. 291 [80 Am. Dec. 783], the majority of the court held that the sheiriff was not so liable.

The following cases are very clear and satisfactory authorities against the liability of municipal corporations to garnishment: *Hawthorn v. City of St. Louis*, 11 Mo. 59 [47 Am. Dec. 141]; *Fortune v. St. Louis*, 23 Id. 239; *Mayor etc. of Mobile v. Rowland*, 26 Ala. 498; *Mayor etc. of Baltimore v. Root*, 8 Md. 95 [63 Am. Dec. 692]; *Erie v. Knapp*, 29 Pa. St. 173.

Very little, perhaps, could be added to the reasoning of these cases upon the subject. Yet there is one consideration that might be added, illustrating the public inconvenience which would result from the opposite doctrine. That is, that contractors with municipal corporations are frequently compelled to rely on the payments as a means of completing their contracts. So that if these payments could be suspended by means of garnishment, until private litigation could be settled, and perhaps finally diverted entirely to pay the contractors' debts, in addition to the inconveniences more distinctly pointed out in the cases referred to, the public works themselves might be delayed and their benefit lost, until the corporation could be fortunate enough to find some contractor, of whom nobody claimed to be a creditor.

I think the language of the statute also furnishes a clear implication that municipal corporations were not within its intention. Section 46, chapter 130, R. S. 1858, prescribes the mode in which corporations may be garnished. It was evidently the intention to designate specifically those which were usually the principal officers in the corporations within the scope of the statute. They accordingly specified the "president, cashier, treasurer, and secretary." None of these titles is usually applicable to the officers of a municipal corporation, except that of treasurer, but they describe the usual principal officers of private corporations. The fact that no mention is made of a mayor, clerk, or alderman, the usual principal officers of a municipal corporation seems to me to indicate that the legislature did not intend to subject that class of corporations to the provisions of the act.

The majority of the court is of the opinion that the judgment should be affirmed, with costs.

DIXON, C. J., dissented.

MUNICIPAL CORPORATION IS NOT SUBJECT TO GARNISHMENT: *Bingham v. City of Racine*, 26 Wis. 450, 451; *Merrell v. Campbell*, 49 Id. 536; *Wilkinson v. Hoffman*, 61 Id. 639; *Mervin v. City of Chicago*, 45 Ill. 136; and see *Bates v. Chicago etc. Ry.*, 60 Wis. 306, all citing the principal case. See, further, *Mayer etc. of Baltimore v. Root*, 63 Am. Dec. 692, and the note thereto.

THE PRINCIPAL CASE IS ALSO REFERRED TO IN *Wallace v. Lawyer*, 54 Ind. 506, on the point that a body, politic and corporate, cannot, in proceedings supplementary to execution, be required to answer to its indebtedness to the execution debtor; and in *J. I. Case etc. Co. v. Miracle*, 54 Wis. 299, on the point that an executor or administrator is not subject to garnishment before a final order for the distribution of the estate is made.

BARNES v. MARTIN.

[15 WISCONSIN, 260.]

OWNER OF CHATTEL HAS NO RIGHT TO RETAKE IT BY FORCE from one who has obtained peaceable possession of it, lawfully or unlawfully.

ASSAULT IS COMMITTED BY OWNER OF CHATTEL IN GOING UP TO ONE IN PEACEABLE POSSESSION OF IT, with a knife, threatening and intending to commit violence upon him, in order to obtain the chattel.

ONE WHO RESISTS ATTEMPT OF OWNER OF CHATTEL TO TAKE IT FROM HIS POSSESSION BY FORCE, is not liable in exemplary damages, unless he is guilty of excessive force, and acts from motives of malice.

DAMAGES FOR WIFE'S LOSS OF TIME CANNOT BE RECOVERED in joint action by husband and wife for an assault and battery upon the wife. The time and services of the wife belong to the husband, and for their loss he must sue alone.

DAMAGES MAY BE RECOVERED, IN ACTION FOR ASSAULT AND BATTERY, for circumstances of outrage and insult which wound the feelings, and tend to lower the party aggrieved in the estimation of his fellow-citizens; but not for any public odium which might arise from an exposure at the trial of the domestic quarrels of the husband and wife who sue for an assault and battery upon the wife.

AFFIDAVIT MADE BY DEFENDANT FOR CHANGE OF VENUE, SHOWING OWNERSHIP OF PROPERTY, is admissible to show his wealth, in an action against him for an assault and battery.

HUSBAND IS COMPETENT WITNESS, under the Wisconsin revised statutes, in an action by the husband and wife for an injury to the wife.

ACTION by Peter J. Martin and his wife, Barbara, against the defendant, Barnes, for an assault and battery upon the wife. The plaintiffs' cow, while trespassing upon the defendant's land, was taken up by the defendant, and was in his peaceable possession at the time of the affray. Mrs. Martin came for the cow, and demanded that it be delivered up to her, which the defendant refused to do; whereupon Mrs. Martin went home, but soon returned with a knife, and threatened to take the cow by force. The defendant resisted, and in doing

so, committed the injuries complained of. The plaintiffs gave evidence, against the defendant's objection, tending to show that in consequence of the injuries inflicted upon Mrs. Martin, she was obliged to have medical attendance, and aid about her household work. They also offered evidence, against objection, for the purpose of showing the defendant's wealth, the affidavit made by him for a change of venue, containing some statements as to certain property which had been in litigation with citizens of the county, in consequence of which he asserted that he could not have a fair trial therein. The plaintiff Peter J. Martin was examined as a witness for the plaintiffs. The defendant objected to his competency, but the court overruled the objection. The defendant asked the court to instruct the jury: 1. That if the cow was trespassing upon the defendant's lot at the time he took possession of her, his possession was lawful, and the plaintiff Barbara had no right to retake the cow by force; 2. That if the cow was trespassing upon the defendant's lot at the time he took possession of her, such possession was lawful under the law relating to estrays, and the plaintiff Barbara had no right to take the cow out of the possession of the defendant by force; 3. That the plaintiff Barbara had no right to take the cow out of the defendant's possession by force; 4. That if the plaintiff Barbara intended by her acts, in order to obtain the cow, to commit violence upon, or menaced violence to the defendant, with the knife, then her acts in coming up to the defendant, with the intention of executing her purpose, amounted to an assault first upon the defendant; 5. That if the plaintiff Barbara entered the defendant's lot by force, or contrary to the direction of the defendant, and intended by her acts to take the cow out of his possession by force, then the defendant was justified in defending his possession of the lot and the cow by force, provided the force was proportioned to the resistance; 6. That the jury had no right to find punitive or exemplary damages, unless they first found that the acts of the defendant, in resisting the taking of the cow from him, were governed by wanton or malicious motives, and were without apparent cause; and 7. That if the husband instructed his wife not to cut the cow loose, then neither the wife, nor the husband for her, could claim any more protection or right, on her account, than a stranger could claim, who should have attempted to take forcible possession of the cow. The court gave the first instruction, inserting the word "inclosed" before the word "lot," and adding at the

end, "whether his possession was lawful or unlawful." The second instruction was given with the addition "that the defendant must have clearly notified or sufficiently indicated to the owners on what ground he took up the cow, and it is left to the jury to say whether he notified the owner that he did take up the cow as an estray." The third, fifth, and seventh instructions were given, and the fourth and sixth refused. The court also charged that if the jury found for the plaintiffs, they might give punitive damages; and if they found for the defendants, they might compensate them for mortification and injury to feelings, loss of time, and standing in society. The plaintiffs had a verdict.

George B. Judd, for the plaintiff in error.

Cary and Pratt, for the defendants in error.

By Court, DIXON, C. J. All the witnesses concur in saying that the plaintiff in error had taken up and was peaceably possessed of the cow at the time of the affray. The defendant in error, Barbara, came for and demanded that the cow be delivered up, which the plaintiff refused. She then went home, and soon afterward returned with a knife in her hand, avowing her purpose to take the cow by force. The plaintiff resisted, and it was in the prosecution of this unlawful enterprise that she received her injuries. For whether the plaintiff was authorized to take up the cow, and might lawfully detain her or not, the defendant Barbara had no right to retake her by force. The law affords ample redress for all injuries of that kind, and will not justify parties in resorting to violence and breaking the public peace. The defendant was therefore acting in her own wrong in thus endeavoring to dispossess the plaintiff, and that, whether his possession was lawful or unlawful. Under these circumstances, we think it clear that the judge should have given the fourth and sixth instructions asked by the plaintiff. It cannot be disputed, if the jury had found that the defendant in error, in order to obtain the cow, threatened and intended to commit violence upon the plaintiff with the knife, that her acts in coming up to him with the intention of executing such purpose would have amounted to an assault. Neither can it be claimed that vindictive damages should be given in such a case, unless the jury should find that the acts of the party resisting were without apparent cause, and proceeded from wanton or malicious motives. It would seem to be one of the clearest principles of justice, that a party resist-

ing the forcible and unlawful act of another ought not to be punished by way of exemplary damages, unless he be guilty of excess, and act from motives of malice.

The judge was also wrong in charging the jury that, if they found for the plaintiffs (defendants in error), they might give punitive damages. The facts did not warrant an instruction so broad and unqualified. He should have told them that their right to do so depended upon their finding the qualifying facts above stated.

The "loss of time" is no part of the injury for which compensation can be given in this action. The time and services of the wife belong to the husband, and for a loss of them he must sue alone. The joint action can only be brought for the personal suffering or injury to the wife: 1 Chitty's Pl. 73; *Lewis v. Babcock*, 18 Johns. 443.

"Loss of standing in society," is a very vague and uncertain element of damage in a battery. If by it were meant circumstances of outrage and insult which wound the feelings and tend to lower the party aggrieved in the estimation of their fellow-citizens, it was well enough. But if, as was argued by counsel, it was intended that the jury might give compensation for any public odium which might arise from the exposure, at the trial of the domestic quarrels of the defendants in error, then it was clearly wrong.

There was no error in receiving the affidavit of the plaintiff in error for the purpose of showing his wealth. If he had requested, no doubt the court would have limited the reading of it to such facts as pertained to that subject.

The husband, Peter J. Martin, was properly received as a witness. He was a party to the action, and not within the exceptions specified in the statute: R. S., p. 818, sec. 2. The legislature obviously intended that the rights of the parties to testify in their own behalf should be reciprocal, which would not be the case were one to be excluded because his or her husband or wife happened also to be a necessary party. The legislature have made no such exceptions, and we cannot. Neither can we see any motives of policy which should forbid their giving evidence in such cases: *Marsh v. Potter*, 30 Barb. 506; *Babbott v. Thomas*, 31 Id. 277; *Lockhart v. Luker*, 36 Miss. 68.

Judgment reversed, and a new trial awarded.

RECAPTION OF PERSONAL PROPERTY. — Whether the owner of personal property, or the one entitled to its possession, has the right under any or all circumstances to retake it, if it is wrongfully taken or detained from him, is

an interesting question and one of some practical importance, but strange to say, it is one to which the law as yet gives no certain answer.

DEFENSE OF ONE'S PROPERTY. — To aid us in arriving at a correct solution, it may be useful to recur to some propositions concerning the right which one has to defend his possession of property against a wrong-doer; for on principle, a man should not be justified in doing more to retake his property than to defend it.

The proposition is elementary that the owner or person entitled to the possession of lands or chattels may lawfully defend his property against a wrong-doer who seeks to possess himself of it, or commit a trespass upon it, using no more force than necessary for the defense, and he is not liable civilly or criminally for so doing: *Com. Dig.*, tit. Pleader, 3, M, 17; *Foster's Crown Law*, 273; 1 *Wharton's Crim. Law*, sec. 621; 1 *Bishop's Crim. Law*, sec. 861; 2 *Addison on Torts*, *Dudley and Baylies's ed.*, 693; 1 *Waterman on Trespass*, sec. 158; *Weaver v. Bush*, 8 *Term Rep.* 78; *Alderson v. Waistell*, 1 *Car. & K.* 358; *Warde v. Eyre*, 2 *Bulst.* 323; *S. C.*, *Cro. Jac.* 386; *Baldwin v. Hayden*, 6 *Conn.* 453, 457; *Commonwealth v. Kennard*, 8 *Pick.* 133; *Pond v. People*, 8 *Mich.* 150; *Gyre v. Culver*, 47 *Barb.* 592; *Davis v. Whitridge*, 2 *Strob.* 232; *State v. Patterson*, 45 *Vt.* 308. "The law does not oblige the owner of property," says Johnson, J., in *Gyre v. Culver*, *supra*, "to stand idly by and see a thief or trespasser take his property from his premises, or limit him to mere verbal remonstrance. He may act promptly, and whether he may use force or not in the first instance, and what degree of force, depends upon the exigency of the particular case. The mere taking of the property by the owner, under such circumstances, from the custody of the wrong-doer, without other force or violence, would not constitute an assault and battery. If the taking, or the attempt to take, is resisted by the trespasser, and he persists in his attempts to retain possession, and carry the property off, then the owner may lawfully use so much additional force as may be necessary to prevent it." But the force must be entirely defensive: 1 *Waterman on Trespass*, sec. 163; *Johnson v. Patterson*, 14 *Conn.* 1; *S. C.*, 35 *Am. Dec.* 96; *Elliott v. Brown*, 2 *Wend.* 497; *S. C.*, 20 *Am. Dec.* 644; and if the trespass is not accompanied with violence, the owner must first request the wrong-doer to depart, and if he refuses, may then gently lay hands on him for the purpose of removing him, and if he resist, force sufficient to expel him may be used; but if the trespasser enter the close with force, the owner may, without previous request to depart or desist, use violence in return in the first instance proportionate to the force of the trespasser: *Scrībner v. Beach*, 4 *Denio*, 448; *S. C.*, 47 *Am. Dec.* 265; *McIlroy v. Cochran*, 2 *A. K. Marsh.* 271. So an assault is not justified by a mere suspicion or fear of an encroachment: *McAuley v. State*, 3 *G. Greene*, 435. Whether a beating administered in repelling a trespass was excessive and beyond what is necessary for the defense of one's property, is a matter for the jury to determine, under all the facts and circumstances of the case: *Riddle v. Brown*, 20 *Ala.* 412; *S. C.*, 56 *Am. Dec.* 202.

While a person may justify an assault and battery in defense of his possessions, it is said that he cannot justify a maiming or wounding: 2 *Hawk. P. C.*, c. 23, sec. 23; 1 *East's Crown Law*, c. 7, sec. 9; *Scrībner v. Beach*, *supra*; *Shain v. Markham*, 4 *J. J. Marsh.* 578; *S. C.*, 20 *Am. Dec.* 232; but we take it, this rule should properly apply only to criminal prosecutions, and not to civil actions, where the injury necessarily occurred in the mere defense; so it is held in *Shain v. Markham*, *supra*, that if the intruder commits an assault upon the possessor, when the latter undertakes to remove him, in defending the assault

a wounding may be justified; and to the same effect is *McIlroy v. Cockran*, 2 A. K. Marsh. 271; but the personal assault would then form the grounds of justification. The restriction cannot be intended to extend to cases where a man defends himself against a known felony threatened to be committed with violence against his property: 1 East's Crown Law, c. 7, sec. 9.

An assault with intent to kill, to prevent a mere trespass to property, is certainly unjustifiable: *State v. Morgan*, 3 Ired. 186; S. C., 38 Am. Dec. 714; *Kunkle v. State*, 32 Ind. 220; and if the possessor of property deliberately kills the trespasser, it is murder, although the killing be necessary to prevent the trespass: *Carroll v. State*, 23 Ala. 28; S. C., 58 Am. Dec. 282; *Harrison v. State*, 24 Ala. 67; S. C., 60 Am. Dec. 450; *Simpson v. State*, 59 Ala. 1, 14; *Hayes v. State*, 53 Ga. 35; *State v. Vance*, 17 Iowa, 138; *Commonwealth v. Drew*, 4 Mass. 391; *McDaniel v. State*, 8 Smedes & M. 401; S. C., 47 Am. Dec. 93; *State v. Zellars*, 7 N. J. L. 220, 243; *State v. Morgan*, *supra*; but if the killing occur without any intention to take life, or if the injury be inflicted with a weapon, and in a manner not likely to produce death, and the trespasser should happen to be killed, it will be at most, only manslaughter: *Commonwealth v. Drew*, *supra*; *State v. Vance*, *supra*. If, however, the rightful possessor of property has a reasonable apprehension of danger from the intruder, resistance with a deadly weapon is justifiable: *People v. Dana*, 53 Mich. 490; S. C., 51 Am. Rep. 151; and if the intruder intends to commit a felony, killing is justifiable, if resistance to that extent is necessary: 1 Waterman on Trespass, sec. 164; *Scribner v. Beach*, 4 Denio, 448; S. C., 47 Am. Dec. 265; *People v. Payne*, 8 Cal. 341. In *State v. Morgan*, *supra*, it is said to be "clear that if one man deliberately kills another to prevent a mere trespass to his property, whether that trespass could or could not be otherwise prevented, he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save property, but he might take the life of his assailant to save his own." So in *Simpson v. State*, 59 Ala. 1, it is observed that "when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases, inflict great bodily harm, or endanger human life."

Upon the same principles, the owner and possessor of lands has the right to remove a trespasser. But if the trespasser enter peaceably, and is discovered there doing no violence, a request to depart and a refusal to do so are necessary before a resort may be had to force to expel him: *State v. Woodward*, 50 N. H. 527; and only necessary force to eject a trespasser is allowed: *Loomis v. Terry*, 17 Wend. 496; S. C., 31 Am. Dec. 306; a beating, wounding, and knocking the wrong-doer down cannot be justified: *Gregory v. Hill*, 8 Term Rep. 299. A man is authorized to order another to leave his house, but has no right to put him out by force until gentle means fail; he is authorized to lay his hands upon the trespasser softly, and if he then resist, the use of force is warranted: *McCoy v. State*, 8 Ark. 451; and if one goes to the house of another in a peaceable manner, without offering or threatening violence to the person or dwelling of the latter, and upon being ordered off and not going immediately, is killed by the owner of the premises, the slayer is guilty of murder, although it be proved that he had previously forbidden the deceased from coming on the premises: *State v. Smith*, 3 Dev. & B. 117.

RETAKEING ONE'S PROPERTY. — At the common law, an owner of land, having the right to the possession, might retake possession from a wrong-doer by force, without incurring any liability in a civil action, although perhaps he might be liable for a breach of the peace: *State v. Roe*, 4 Jones, 315; S. C., 69 Am. Dec. 751, and note thereto discussing the proposition. It would seem, however, that he certainly could not use a greater degree of force than that which might be used to defend his possession, according to the rules stated above. Statutes of forcible entry, however, have long since prevented him from thus retaking possession of his land; but these statutes have not been extended to personal property, and the common-law rules must, therefore, prevail in this regard.

There can be no doubt that an owner or other person entitled to the possession of personal property may peaceably retake his property from the unlawful possession of another, and is not liable civilly, and of course not criminally, for so doing: See *Shipman v. Horton*, 17 Conn. 481; *Bowler v. Eldredge*, 18 Id. 1; *Burris v. Johnson*, 1 J. J. Marsh. 196; *Sims v. Reed*, 12 B. Mon. 51; *Spencer v. McGowan*, 13 Wend. 256; *Chamberlain v. Smith*, 44 Pa. St. 431; *West v. Bolton*, 4 Vt. 558; *Richardson v. Anthony*, 12 Id. 273; *Merritt v. Miller*, 13 Id. 416; and it is likewise undoubted that he may justify an entry upon the lands of another to obtain his chattels, which are wrongfully placed there by the owner of the lands himself, or with his assent: Vin. Abr., tit. Trespass, 1, A; Com. Dig., tit. Trespass, D; 2 Waterman on Trespass, sec. 803; *Chapman v. Thumblethorp*, Cro. Eliz. 329; *Patrick v. Colerick*, 3 Mees. & W. 483; *Webb v. Beavan*, 6 Man. & G. 1055; *Chambers v. Bedell*, 2 Watts & S. 225; S. C., 37 Am. Dec. 508; *Barnes v. Dean*, 5 Watts, 543; S. C., 30 Am. Dec. 346; *Allen v. Feland*, 10 B. Mon. 306; *Wheelden v. Lowell*, 50 Me. 499. Some cases in New York seem to be opposed to this conclusion, but they are clearly against the weight of authority: *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Id. 406. An entry, however, would not be justified if the property is on the land of another, by the fault of the owner of the chattels, and without the permission of the owner of the land: *Newkirk v. Sabler*, 9 Barb. 652. If the owner of land sells personal property situated on the land, the vendee obtains thereby an implied license to enter upon the premises and take possession of and remove the property: 2 Waterman on Trespass, sec. 800; Cooley on Torts, 51; *Wood v. Manley*, 11 Ad. & E. 34; *Giles v. Simonds*, 15 Gray, 441; S. C., 77 Am. Dec. 373.

But there is much difficulty where the retaking is not peaceable, but is accompanied with force. Blackstone says that the owner of goods "may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace"; but he probably did not mean that the owner forcibly retaking the goods would, in all cases, be civilly liable to the wrong-doer, although he might be criminally answerable for a breach of the peace: See *Bowler v. Eldredge*, 18 Conn. 1, 17. Judge Cooley seems to consider that a man has no right to retake his chattels, unless he does it peaceably: Cooley on Torts, 50. In 1 Waterman on Trespass, sec. 159, it is said that "the law does not oblige the owner of goods to stand idly by and see a thief or a trespasser take them from his premises, or limit him to a mere verbal remonstrance. He may act promptly, and whether he may use force or not in the first instance, and what degree of force, depends upon the exigency of the particular case. The mere taking of the property by the owner, under such circumstances, from the custody of the wrong-doer, without other force or violence, would not constitute an assault and battery"; and to the same effect, see the remarks of Johnson, J.,

In *Gyre v. Oaker*, 47 Barb. 592, quoted *supra*. And again: "Where personal property is immediately followed for recapture from the individual taking it, the same rule for the most part holds, as in the defense of property in possession": 1 Waterman on Trespass, sec. 167. "Most cases of this kind," says the same author, "arise where there is a felonious intent. When such is the cause of the taking, the urgency of a recapture is vastly greater than where the taking arises from a mere conflicting claim of title in the property. In the former case, a greater degree of force may, with propriety, be resorted to than in the latter. But a resort to any unusual degree of violence, where there is no felonious intent, or where the violence is disproportioned to the exigency, or where there are other remedies equally effective, should not be encouraged, and will always admit of more or less doubt, whether it can be justified": 1 Waterman on Trespass, sec. 168; and see *Id.*, sec. 439; and to the same effect is *State v. Elliott*, 11 N. H. 540, in which it was held that the owner of property might retake it, using no more force than necessary.

In 1 Hawk. P. C., c. 64, sec. 1, it is observed that "it seems certain that even at this day, he who is wrongfully dispossessed of his goods may justify the retaking of them by force from the wrong-doer, if he refuse to deliver them; for the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought." In *Hyatt v. Wood*, 4 Johns. 150; S. C., 4 Am. Dec. 258, 260, involving the right of one entitled to the possession of land to enter and turn out a wrong-doer, Spencer, J., states the doctrine with his usual clearness and accuracy. "In a case bearing analogy to the present, of personal property, the right of recaption exists, with the caution that it be not exercised riotously, or by a breach of the peace; for should these accompany the act, the party would then be answerable criminally; but the riot or force would not confer a right on a person who had none, nor would they subject the owner of the chattel to a restoration of it to one who was not the owner"; and see *Scribner v. Beach*, 4 Denio, 448; S. C., 47 Am. Dec. 265, 267. In *Blades v. Higgs*, 10 Com. B., N. S., 713, S. C., 30 L. J. Com. P. 347, to a count for assaulting the plaintiff, the defendants pleaded that the plaintiff had wrongfully in his possession dead rabbits belonging to the marquis of Exeter, and being about to carry them away, the defendants, as the servants of the marquis, and by his command, requested the plaintiff to refrain, which he refused to do; whereupon, the defendants, as the servants of the marquis, and by his command, gently laid hands on the plaintiff and took the rabbits from him, using no more force than was necessary: held, a good plea, although it did not allege how the plaintiff took the property, and became holder thereof. Erie, C. J., said that "if the defendant had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and retake the chattels; and we think there is no substantial distinction between that case and the present, for if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner." The judge quotes the case of *Harvey v. Brydges*, 14 Mees. & W. 437, and says: "In our opinion, all that is so said of the right of property in land applies in principle to a right of property in a chattel, and supports the present justification."

In the following cases, also, the right of an owner or other person entitled to the possession of personal property, to retake it by force from a wrong-doer, using no more force than necessary, is sustained: *Sterling v. Warden*, 51 N. H. 217; S. C., 12 Am. Rep. 80, and 52 N. H. 199, 203; *Hopkins v. Dickson*, 59 Id. 235; *Hogeden v. Hubbard*, 18 Vt. 504; S. C., 46 Am. Dec. 167; *White v. Twitchell*, 25 Vt. 620; S. C., 60 Am. Dec. 294; *Johnson v. Perry*, 56 Vt. 703; S. C., 48 Am. Rep. 826; *Mills v. Wooters*, 59 Ill. 234; *Leaird v. Davis*, 17 Ala. 448; and it is held that whether one uses more force than necessary, is a question for the consideration of the jury: *Baldwin v. Hayden*, 6 Conn. 453. A few cases, among them the principal case, deny the right: *Robb v. Benworth*, Litt. Sel. Cas. 81; S. C., 12 Am. Dec. 273; *Sims v. Reed*, 12 B. Mon. 51; *Andre v. Johnson*, 6 Blackf. 375; *Huppert v. Morrison*, 27 Wis. 365; *Hutchinson v. Audsley*, 56 L. T. (folio) 91, in which *Blades v. Higga*, *supra*, was attempted to be distinguished; note to *Chambers v. Miller*, 3 Fost. & F. 202; compare *Harvey v. Mayne*, L. R. 6 O. L. 417. If a person hire a horse for a certain time to go to a particular place, the owner cannot justify retaking the horse violently within the time, although the hirer go to a different place; for during the time the hirer has a special property in the horse as against every one: *Lee v. Atkinson*, Cro. Jac. 236; S. C., Yel. 172. Indeed, a hirer for a certain time, if dispossessed by the owner during that time, has the right to retake the property, using no more force than necessary for that purpose: *Leaird v. Davis*, 17 Ala. 448. In order, therefore, that the owner of a chattel may have the right of recaption, he must be entitled to the possession.

The conflict on this subject is perhaps due, to a great extent, to the failure to observe the distinction between civil suits and criminal prosecutions growing out of the retaking of property, and to the further fact that the retaking is really a defense of one's property in many cases. The correct conclusion would seem to be that one entitled to the possession of a chattel may take it from a wrong-doer by force, and he will not be liable in a civil action therefor, provided no more force than necessary was used, but that he will be liable to be punished in a criminal prosecution at all events, unless the recapture was so necessarily connected with a wrongful taking that it may properly be considered as a defense of property; in which case the rules as to defense will govern, and in many instances will release him from any criminal responsibility.

TWO ACTIONS ARE POSSIBLE WHERE WIFE IS INJURED THROUGH NEGLIGENCE OR DESIGN OF ANOTHER: one by the husband and wife for the injury to the wife's person; the other by the husband alone, for the loss of service, expenses, etc.: *Long v. Morrison*, 77 Am. Dec. 72, and note; *Rogers v. Smith*, 79 Id. 193, and note; and see *Sheldon v. Steamship Uncle Sam*, Id. 193. For an injury done to the wife by an assault and battery, or other actionable wrong, the husband and wife must both join as parties plaintiff, in an action therefor: *Gibson v. Gibson*, 43 Wis. 25. But in an action for negligent injuries to the wife, brought by the husband and wife, recovery cannot be had for the loss of her services, or for the husband's expenses of nursing and medical attendance: *Kavanaugh v. City of Janesville*, 24 Id. 621, — both citing the principal case.

EVIDENCE OF PREJUDICIAL CIRCUMSTANCES OF DEFENDANT ARE ADMISSIBLE, IN AWARDING EXEMPLARY DAMAGES: *Rowe v. Moses*, 67 Am. Dec. 560, and the note thereto. The principal case is cited to this effect in *Winn v. Peckham*, 42 Wis. 500; *Brown v. Swineford*, 44 Id. 291.

THE PRINCIPAL CASE IS ALSO CITED IN *Holmes v. City of Fond du Lac*, 42 Wis. 285, to the point that in an action by a husband and wife to recover damages for injuries to her, the husband may be examined as a witness for the plaintiff; and if the husband and wife properly join in an action affecting the wife's separate property, the husband is a competent witness for his wife: *Hackett v. Boswell*, 16 Id. 476; *Snell v. Bray*, 56 Id. 161; and in general, where a husband and wife are parties to the same action, they may testify as other witnesses, notwithstanding their interest in the suit and their marriage relations: *Strong v. City of Stevens Point*, 62 Id. 261. So a wife, who acts as her husband's agent in taking care of property, is a competent witness, in an action on a policy of insurance, as to facts within her knowledge connected with a loss of the property: *O'Connor v. Hartford F. Ins. Co.*, 31 Id. 163.

SHEPARD v. MILWAUKEE GAS LIGHT COMPANY.

[15 WISCONSIN, 212.]

GAS COMPANY CANNOT REQUIRE PERSON TO SIGN WRITTEN APPLICATION FOR GAS, stating the number of burners, etc., which it might otherwise require him to sign, where the application is in an agreement, which contains a promise to abide by certain unreasonable and illegal rules and regulations adopted by the company, so that he could not sign the application without being bound by the promise; and the company, by presenting the application in that shape, waives its right to insist upon the application in any other.

GAS COMPANY IS LIABLE IN SUCH DAMAGES FOR WRONGFULLY REFUSING TO SUPPLY ONE'S STORE WITH GAS as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business, arising out of the company's refusal.

DAMAGES FOR LOSS OF PROFITS OF BUSINESS, NECESSARILY CAUSED BY GAS COMPANY'S WRONGFUL REFUSAL TO SUPPLY STORE WITH GAS, MAY BE RECOVERED against it; and therefore, in an action against the company for such wrongful refusal, evidence by the plaintiff to show the nature and extent of his business, and that the want of gas would tend to prevent customers from coming to his store, is admissible.

DEMAND FOR GAS AND TENDER OF PAYMENT NEED NOT BE REPEATED MONTHLY in order that an applicant may be entitled to recover damages from a gas company during all the time the gas was wrongfully withheld from him, where the rules of the company did not require payment for gas in advance, but that bills should be paid on the first of each month, and the company refused to furnish him with gas solely because he refused to sign an agreement to abide by certain illegal rules and regulations of the company.

ACTION for wrongfully refusing to furnish gas to light the plaintiff's store. In a previous action between the same parties, *Shepard v. Milwaukee Gas Light Co.*, 70 Am. Dec. 479, it was held that the company could not require its customers to sign an agreement to abide by certain unreasonable rules and regulations, but that it might reasonably require its customers

to sign written applications, stating the number of burners required, etc. In the present case, the plaintiff, on February 7, 1857, tendered the secretary and superintendent of the company five dollars, and requested him to put on the gas in the plaintiff's store. The secretary refused to do so, unless the plaintiff signed an application for gas, stating the number of burners, etc., and containing a promise to abide by the rules and regulations. This the plaintiff refused to sign. To prove his damages, the plaintiff gave evidence to show the nature and extent of his business, as a dealer in hardware; that it was inconvenient and difficult to transact it without gas; and that the want of gas made his store less attractive to customers, and tended to diminish his business, other stores having gas. The rules of the company did not require payment for gas to be made in advance, but reserved the right to demand payment or security, when the company deemed it necessary, and provided that bills should be payable monthly, on the first of each month. The company did not demand payment in advance or security from the plaintiff. The plaintiff made no demand for gas, or tender of payment, after the first. The rulings of the court on the question of damages are given in the opinion. The plaintiff had a verdict.

Jason Downer, for the appellant.

Smith and Salomon, for the respondent.

By Court, PAINE, J. It has been already decided by this court that the gas company could not require the plaintiff to sign an agreement to abide by the rules and regulations, which had been adopted at the time the plaintiff's application for gas was made.

It was, at the same time, held that the company might reasonably require its customers to sign written applications stating the number of burners, etc. On the last trial, it was made to appear that the written agreement which the plaintiff was requested to sign, which contained a promise to abide by the rules and regulations, contained also the application for gas, stating the number of burners.

It is contended that as the company might require the plaintiff to make this application, and as he refused to sign the agreement which contained it, therefore he was himself in fault, in refusing to comply with a reasonable regulation, and his action could not be sustained. This conclusion would undoubtedly be correct, if the request to sign the application

had been presented in such a form that the plaintiff could have complied with it without at the same time signing an agreement which he was not bound to sign. But the agreement, which he was required to sign as a condition precedent to having gas, consisted not only of the mere application, which was unobjectionable, but also of an agreement to take it upon the terms and conditions mentioned in the rules and regulations. This he was not bound to do. And therefore, as the only application which he was ever asked to sign was so connected with an objectionable agreement that he could not sign one without being bound by both, of course he was not obliged to sign it; and the company, having presented it in that shape, must be held, by resting upon that, to have waived every other.

And it seems to us very evident that this point is entirely an afterthought, devised by the ingenuity of the counsel, and that it was not at all in the minds of the parties at the time the application was made. The company did not insist on the plaintiff's signing, merely to have a written application stating the number of burners. Nor did the plaintiff refuse because he was unwilling to sign such an application. But the company insisted in order to compel the plaintiff to agree to the rules and regulations, and the plaintiff refused in order to avoid that. And it would be very strange if the company could escape the consequences of its wrongful requirement by merely connecting with the objectionable provisions something unobjectionable, but so connected with the other that a signature to one bound the party by both.

But it is said that the court erred in the rule of damages. It told the jury that "the plaintiff, if entitled to a verdict, should have such damages as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business, arising out of the defendant's refusal to furnish gas to the plaintiff."

It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But we think this is clearly not so. The "inconvenience and annoyance" occasioned directly by the wrongful act or refusal of the defendant, are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this as a punishment for the other party. In actions for a nuisance, the damage usually consists almost entirely in inconvenience and annoyance. So also in many other actions

of tort. In *Ives v. Humphreys*, 1 E. D. Smith, 201, the court says: "Even if the plaintiff be confined strictly to compensation for the injury sustained by him, the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy, and interference with the comfort of the plaintiff and his family." And again: "For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff, and in estimating the amount of such damages, all of the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, or pain or insult, or inconvenience."

So in an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the general allegation of damage, as going to show that "the plaintiff had sustained inconvenience": *Ward v. Smith*, 11 Price, 19. But it seems unnecessary to pursue this point, as it is really very plain that an instruction, that the jury might consider the inconvenience and annoyance occasioned to the plaintiff by the wrong of the defendant, is not equivalent to an instruction that they might allow vindictive damages.

But the appellant further objects to the admission of evidence to show that it would injure the plaintiff's business to be deprived of gas when other stores were lighted with it. It is said that the object of this was to show that the want of gas would tend to prevent customers from coming to the store, and consequently that the plaintiff lost the profits that he otherwise might have made. And the appellant then relies on a class of authorities in which, both in actions of tort and for breaches of contract, it has often been held that anticipated profits could not be recovered as damages. Upon this subject, the authorities are full of confusion and uncertainty; and it is very generally conceded that no definite or satisfactory rule can be extracted from them: *Sedgwick on Damages*, p. 112; *City of Cincinnati v. Evans*, 5 Ohio St. 608. But I think it can by no means be said to be established that the profits of a business, or of a contract, may never be considered in estimating the damages, where one party has been deprived of those profits by the wrong or default of another. On the contrary, I think the opposite conclusion is sustained, and

that the tendency of the recent cases is to allow such profits to be recovered as damages, where their amount can be shown with reasonable certainty.

The question often arises in cases of breach of contract, and there are many authorities which hold that the profits that might have accrued to the injured party on the contract itself, which was broken, may be recovered as damages: *Philadelphia W. & B. R. R. Co. v. Howard*, 13 How. 344; *Masterton v. Mayor etc. of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38]; *Fox v. Harding*, 7 Cush. 522. These cases confine the profits to be recovered to such as might have been made on the contract, the breach of which is complained of.

Yet it is very evident that even such profits cannot be arrived at with any absolute certainty, as they frequently depend upon fluctuations in the market, and changes in the price of labor and materials, which may take place while the contract is being performed. Yet inasmuch as they may be estimated with reasonable certainty, and their loss is the direct result of the wrong complained of, they are allowed to be recovered. And in the case of *Waters v. Towers*, 20 Eng. L. & Eq. 410, the rule was extended so as to include profits on a collateral contract which the plaintiffs had entered into with other parties. The court said: "If reasonable evidence is given that the amount of profit would have been made as claimed, the damages may be asked accordingly."

In *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398, the defendant, who was a common carrier, had neglected to deliver a broken shaft of a mill, which was to serve as a model for the making of a new one, by reason of which the new one was delayed and the mill kept idle for want of it. It appeared that the facts showing that such would be the result of his failure were not communicated to him, and on that ground the court held that the plaintiffs could not recover the profits which the mill might have made during the delay. But it was held that if those facts had been communicated to him, he would have been liable for the profits. In *Fletcher v. Tayleur*, 33 Eng. L. & Eq. 187, the action was brought for damages on a failure to complete a vessel at the time contracted for. The vessel was designed for the Australian trade, and evidence was given to show what would have been her probable earnings during the time of the delay; and the jury gave a verdict which evidently included the profits that might have been made during that period. The court refused to disturb the verdict, and though it is stated

that no question upon that point had been made at the trial, yet the decision does not seem to rest upon that ground. Jervis, C. J., suggests that there should be some general rule, and that the damages might be "estimated according to the average percentage of mercantile profits," and adds that such is, "to some extent, the result of *Hadley v. Baxendale*," 26 Eng. L. & Eq. 398. Crowder, J., quotes *Alder v. Keighley*, 15 Mees. & W. 117, in which he says the court lay it down as a clear rule, "that the amount which would have been received if the contract had been kept is the measure of damages if the contract had been broken"; and he then adds: "I cannot say that the damages in this case have been calculated on a false principle."

I think the principle fairly to be derived from these cases is, that the profits lost as a direct result of a breach of contract may be recovered as damages, where they are not so conjectural and remote as to be incapable of ascertainment with reasonable certainty. And their reasoning seems entirely applicable to this case. The defendant here knew that if it refused gas to the plaintiff, he could get it nowhere else. It stood, therefore, in the same position that the carrier would have been in, in *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398, if he had known the plaintiff could have no shaft to his mill until the model was delivered. The defendant, therefore, must be presumed to have contemplated whatever damage would naturally arise from its refusal to furnish the plaintiff with gas. Its obligation to furnish it was, according to the decisions of this court, as clear and imperative as though it had expressly contracted to do it. And it seems to me that the profits of an established business are quite as capable of being ascertained with reasonable certainty as the profits to arise from a single contract or adventure. There is, in the case of such business, the experience of the past to serve as a test. And the rule suggested by Jervis, C. J., in *Fletcher v. Tayleur*, 38 Eng. L. & Eq. 187, that the damages should be estimated "according to the average percentage of mercantile profits," could readily be applied, and would seem just and reasonable. The cases already referred to seem to me, therefore, applicable here, and to sustain the conclusion that the profits of a business, which are necessarily lost by the wrong or default of another, may, under some circumstances, and with proper restrictions, be considered in estimating the damages for the injury.

The following cases also sustain the same conclusion: *Thomp-*

son v. Jackson, 14 B. Mon. 92; *Davis v. Talcott*, 14 Barb. 611; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Wade v. Leroy*, 20 How. 34. It seems to me also to derive very clear support from the following considerations: It is well established that an action exists in many cases for an injury to a person's trade. Actions for slandering one in his trade or profession are of this character; and the damages are based upon the assumption that such slander injures the party's business by diminishing it. But how does that damage him? Clearly, only by depriving him of the profits he would have made by the business, of which he has been wrongfully deprived. So also of private actions for a nuisance, the only injury being a diminution of the plaintiff's business. The establishment of a fair or market or ferry near the plaintiff's, so as to withdraw his custom and diminish his profits, are illustrations of this class: 3 *Wendell's Bla. Com.* 218; *Aikin v. Western R. R. Co.*, 20 N. Y. 370; *Dewint v. Wilkes*, 9 Wend. 325. In the latter case, the plaintiff was allowed to recover the rent of a tavern owned by him, and which became tenantless by reason of the defendant's breach of his covenant to keep a ferry, running to the tavern, supplied with boats for the accommodation of travelers. In *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281, S. C., 29 Eng. Com. L. 336, the plaintiff, who was a book-seller, was held entitled to recover for damage to his business occasioned by the defendant's leaving certain obstructions in the street on which his store was located, for an unreasonable length of time. The very ground of complaint was that the obstructions diminished his custom, and consequently, deprived him of his profits. So also those actions where bankers are held responsible for damages for not paying their customers' checks, they having funds on hand, are based on the same idea, that such refusal tends to injure the plaintiffs' trade. Thus in *Rolin v. Steward*, 25 Eng. L. & Eq. 341, the defendant, a banker, having funds of the plaintiff, had refused payment of three checks amounting to £111 13s. There was no proof of special damage, but the jury returned a verdict of £500. The court refused to disturb it, on the ground that the refusal had a general tendency to injure the plaintiffs' trade, and that the jury might properly consider that. The principle of that action seems to me very similar to that upon which this should be sustained. Now, all these actions seem to me to be based upon no other idea than that the plaintiff had suffered injury by having the profits of his business diminished.

And if, in all these, an injury to the profits is capable of being ascertained with sufficient certainty to be made the ground of damages, I can see no reason why it cannot be done in actions for a breach of contract, or a wrongful refusal like that now under consideration; for they may be as certainly ascertained in one class of actions as in another.

There are two cases that I have found which, though they may seem to some extent opposed to the conclusions I have stated, I still think really sustain them. In *Marquart v. La Farge*, 5 Duer, 559, the defendant had wrongfully broken up the plaintiff's business in a restaurant. The plaintiff gave evidence of the extent of his business, and that "one half of the receipts were profits." The court held the evidence admissible. It said: "Now, it was certainly competent to prove, in some way, the nature and extent of the injury, and the value of the business was a proper subject of estimate for the jury." They then add: "It may be that a calculation of possible or probable profits, in view of the ordinary uncertainties of business, would not be allowable." If by this the court meant to exclude all consideration of the profits that would have resulted to the plaintiff according to the ordinary course of his business, it seems to me repugnant to what had previously been expressly allowed. They had allowed evidence of what the profits had been; they had said that the jury "must estimate the value of the business," in arriving at the amount of damages. Now I think it is impossible for any jury or judge to do this without considering the profits of that business. The same remarks seem to me applicable to the case of *Cincinnati v. Evans*, 5 Ohio St. 594. There, the defendant had torn down the front part of the shop of the plaintiff, who was a merchant tailor, thus interrupting his business. The court held that "the rentable value of the building would not be a compensation"; that the defendants "must have contemplated a further injury as the necessary consequence of their acts, and for that further injury he is entitled to recover." They then say that the "supposed or contemplated profits of the business" during the period of interruption could not be considered as a measure of the injury, and proceed as follows: "Upon the whole, we are of opinion that in addition to the damages done to the building, he was entitled to recover such further sum as would compensate him for the loss of its enjoyment while the interruption continued." And strangely as it seems to me, they then

add, that "the profits which might have been realized by employing his personal services and capital in the prosecution of his business in the injured building, during the period for which he was deprived of its use, cannot be recovered." If that is so, why allow him to show "the nature and extent of his business," or "the necessity of using the building for its prosecution"? These matters seem entirely immaterial, except with a view of showing the amount of damage from the interruption of that business. They are material to this purpose only so far as they tend to show how much the plaintiff lost by the interruption. And it is obvious to every mind that he lost the profits he would have made if the interruption had not occurred. How could he prove the "value of the business to him," without showing the amount of profits he would have realized according to its ordinary course? How could that value be estimated without including an estimate of the profits? If there is any process by which it may be done, I confess my inability to perceive it; and it seems to me, therefore, that when the court grants the former, and then undertakes to reserve the latter, the reservation is repugnant to the grant, and void. It seems to get at the same result by simply calling it by another name. But whether or not my criticism on these cases is well founded, I may here remark that they both sustain the admissibility of all the evidence which was offered by the plaintiff in this case. He only showed the nature and extent of his business, and the tendency of the defendant's wrongful refusal to injure that business. He did not offer to calculate the amount of profits of which he was deprived, but left the jury to judge from such facts as both of these cases held might be shown, what was the extent of the injury; though I candidly confess I cannot see why these facts are held admissible at all, except as a means of showing the plaintiff's damage in the loss of the profits of his business. Perhaps many of the cases which seem to sustain the general rule that profits cannot be recovered, may be explained upon the principle that the plaintiff might, by reasonable diligence, have avoided the loss, or else upon the principle which *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398, decided, that the loss grew out of some unusual and special circumstances which were not known to the defendant. But subject to these qualifications, I think the authorities fairly sustain the conclusion, that the unavoidable loss of profits which the party committing the injury must be presumed to

have contemplated may in actions of this kind be considered in estimating the damages.

I think, therefore, there was no error in admitting the evidence objected to.

The only other question is, whether there was error in ruling that the plaintiff was entitled to recover damages down to the time of commencing the suit. We think there was none. It is true, he had not tendered pay for all that time. But it was not for want of compliance with the terms of the company as to pay, that he was refused the gas. Their rules did not require pay in advance, but they reserved the right to demand it, or security, when they deemed it necessary. They never demanded either of the plaintiff. But they refused to let him have gas for refusing to comply with other terms which they had no right to impose, and told him he could not have it until he complied with those terms. Having placed themselves upon that position, the plaintiff had a right to assume that they stood there, until notified to the contrary. Their refusal was a continual refusal, until retracted. And we think it would be unreasonable to say that the plaintiff was bound to repeat his demand after such a refusal, in order to entitle him to damages. His first demand was a sufficient indication to the company that he was ready to comply with their terms as far as payment was concerned; and if they afterwards changed their minds, they should have notified the plaintiff accordingly.

The judgment is affirmed, with costs.

The principal case, as it first came before the court, is reported in *Shepard v. Milwaukee Gas Light Co.*, 11 Wis. 234; another action between the same parties will be found in *Shepard v. Milwaukee Gas Light Co.*, 6 Id. 539; S.O., 70 Am. Dec. 479.

GAS COMPANIES, SPECIAL RIGHTS, DUTIES, AND LIABILITIES: See *Shepard v. Milwaukee Gas Light Co.*, 70 Am. Dec. 479, and the note thereto; *Pateron Gas Light Co. v. Brady*, 72 Id. 360; *McCune v. Norwich City Gas Co.*, 79 Id. 273.

THE PRINCIPAL CASE IS CITED to the point that when an article is purchased for a specific purpose, and such purpose is made known to the seller at the time, special damages resulting from the inability of the purchaser to carry out such purpose by reason of the breach of contract may be recovered, in *Richardson v. Chynoweth*, 28 Wis. 660; *Hibbard v. Western U. Tel. Co.*, 33 Id. 568; *Hammer v. Schaeffelder*, 47 Id. 459; *Brown v. Chicago etc. Ry.*, 54 Id. 353; *Cockburn v. Ashland Lumber Co.*, Id. 627; *Hill v. Chipman*, 59 Id. 218; and see *Flick v. Wetherbee*, 20 Id. 396; *Jolly v. Single*, 26 Id. 292; in *Candee v. Western U. Tel. Co.*, 34 Id. 479, to the point that where two parties have made a contract, which one of them has broken, the damages which the other ought to receive should be either such as may fairly and substantially be com-

sidered as arising naturally from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach; and see *Hibbard v. Western U. Tel. Co.*, *supra*; and in *Kinney v. Crocker*, 18 Wis. 82, to the point that in an action to recover damages for personal injuries caused by negligence, evidence of the nature and extent of the plaintiff's business, and the loss resulting to him from inability to attend to it by reason of the injury, is proper, and it is not error to instruct the jury that if a man has an ordinary business, yielding ordinary receipts, he will be entitled to recover the diminution of those receipts resulting from the injury.

FARMERS' LOAN AND TRUST COMPANY v. COMMERCIAL BANK OF RACINE.

[15 WISCONSIN, 424.]

SITUATION OF PARTIES AND NATURE AND OBJECT OF THEIR TRANSACTIONS MAY BE LOOKED AT IN CONSTRUCTION OF WRITTEN INSTRUMENT; but the court cannot look outside of the instrument to get at the intention of the parties, and then carry out that intention, whether the instrument contains language sufficient to express it or not.

NATURE AND OBJECT OF MORTGAGES OF RAILROAD DO NOT GIVE THEM ANY MORE ENLARGED MEANING, where the company mortgages separately, at different times, the two divisions of its road, to raise money to complete the road, and neither of the mortgages contains any language purporting to convey materials to be thereafter acquired, any further than they become a part of or appurtenant to the road, or were used in operating it.

RAILROAD COMPANY IS NOT ESTOPPED FROM DENYING THAT RAILROAD CHAIRS WERE CONVEYED BY PRIOR MORTGAGES, where, after having subsequently acquired the chairs, it executed another mortgage of its road and appurtenances, and all "materials," which mortgage was declared to be subject to the lien of the two prior mortgages, "in all respects prior, superior, and senior liens upon the property and premises described therein, respectively, acquired and to be acquired."

DEFENDANT IN REPLEVIN MAY WAIVE RETURN OF PROPERTY AND TAKE JUDGMENT FOR ITS VALUE ALONE, in Wisconsin, where the plaintiff has obtained possession of the property, and the jury find the defendant entitled to possession.

JURY IS AUTHORIZED TO ASSESS VALUE OF PROPERTY IN ALL CASES, under section 11, chapter 132, Wisconsin Revised Statutes, where they find that the defendant in replevin is entitled to a return, whether he waives it or not.

ACTION to recover the possession of certain railroad chairs, in which the plaintiff replevied the property, under the statute. The plaintiff claimed under two mortgages executed by the Racine and Mississippi Railroad Company, to raise money to complete its road, one executed September 1, 1855, on the eastern division, the other, June 1, 1856, on the western division.

lon. The mortgages purported to convey "all their railroad, with its superstructure, track, and all other appurtenances, . . . and all the right and title of the said parties of the first part to the land on which said railroad is and may be constructed, together with all rights of way now acquired and obtained, or hereafter to be acquired or obtained, by the said parties of the first part, and including the depots, engine-houses, shops, and other constructions, . . . and the lots, pieces, or parcels of land on which the same are or may be erected, and all pieces of land which shall be used for depot and station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences, and structuary thereon, and all other appurtenances belonging thereto, and all the franchises, privileges, and rights of the parties of the first part, of, in, and to, or concerning the same, and also all and singular their railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery, and every other kind of personal property which shall be used for operating said railroad." On January 2, 1857, after the company had acquired the chairs in question, it executed another mortgage of its entire road to Jesup and Raymond, similar in its recitals to the prior mortgages, "subject, however, to the lien of two certain other indentures of mortgage executed by the said Racine and Mississippi Railroad Company, one dated September 1, 1855, upon the eastern division of the road, . . . and the other dated June 1, 1856, upon the western division of the road; . . . the said two mortgages being, and are hereby declared, in all respects prior, superior, and senior liens, upon the property and premises described therein, respectively, acquired and to be acquired." On March 27, 1858, the railroad company also executed a chattel mortgage upon all its personal property and rolling stock to its president, H. S. Durand, and others, to secure them against certain liabilities incurred on account of the company. The chairs in controversy were mentioned in the schedule attached. In April, 1859, these latter mortgagees sold the chairs to the defendant, the bill of sale being executed by Durand, on behalf of the mortgagees, and he, as president of the railroad company, indorsed on it the consent of the company to the sale. On December 3, 1858, the plaintiff commenced an action to foreclose its mortgage of September 1, 1855, and on May 10, 1859, while the action was pending, the railroad company executed to it a deed of surrender of their road, describ-

ing the property so surrendered in the same terms as in its mortgages to the plaintiff. On May 17, 1859, a judgment of strict foreclosure was, by stipulation, rendered against the company in the foreclosure suit. On December 21, 1859, Jesup and Raymond brought suit to foreclose their mortgage, and obtained a judgment, under which a part of the mortgaged property was sold, and purchased at the sale by Jesup, subject to the rights of the plaintiff, under its mortgage of September 1, 1855, and the sale was confirmed January 2, 1861. The defendant had a verdict, and judgment was given in its favor for the value of the property, and damages for its detention.

Strong and Fuller, for the appellant.

Cary and Pratt, for the respondent.

By Court, PAINE, J. In this case the appellant claims a quantity of railroad chairs, under railroad mortgages executed by the Racine and Mississippi Railroad Company. The case has once been before this court, and as it appeared that the chairs in question were acquired by the railroad company after the execution of the mortgages, we held that the plaintiff had no title, for the reason that the mortgages contained no language purporting to grant materials which the company might thereafter acquire, to use in constructing the road, except so far as such materials were actually so used and became a part of the road itself. Some additional evidence was introduced at the second trial, which, the counsel for the appellant claims, furnishes new light upon this question, and shows that the intention of the parties was to grant everything that the company then owned or might afterwards acquire. And he claimed that the intention of the parties should be arrived at, as well by the consideration of their situation and the general nature and object of railroad mortgages as of the words in the instruments. There is no doubt that the intention is the object to be sought for in construction. And to get at that, the situation of the parties and the nature and object of their transactions may be looked at. But it must be borne in mind that it is not the business of construction to look outside of the instrument to get at the intention of the parties, and then carry out that intention, whether the instrument contains language sufficient to express it or not; but the sole duty of construction is, to find out what was meant by the language of the instrument. And this language must be sufficient, when looked at in the light of such facts as the court is entitled to

consider, to sustain whatever effect is given to the instrument. And we can see nothing in the additional evidence now before us which we think ought to change the effect before given to the mortgages under which the appellant claims. The counsel was obliged to concede that the language, accurately construed, did not profess to grant materials to be thereafter acquired, any further than they became a part of the road granted, or appurtenant to it, or should be used in operating it. This, I think, cannot be denied; and so far as the meaning of the language is concerned, I can perhaps add nothing to what I said in the former opinion upon that subject.

Should the general nature and object of the conveyances give to that language any more enlarged meaning? I am unable to see why it should. The company first mortgaged the eastern division of its road. Notwithstanding this, it still remained necessary for it to have materials for the western division. It was therefore utterly improbable that it intended, in the first, to grant all materials that should be thereafter acquired, and was very natural for it to limit the grant to such materials as should actually become a part of the road granted, or be used in operating it. This, being true of the first mortgage, is equally true of the second. For although the first division was mortgaged, it was still in possession of the company, and they might still need materials for its completion. How can it be said, therefore, that they intended in the second to convey all materials thereafter to be acquired, though such materials might be needed for the first division? It is true here that both divisions were mortgaged to the same corporation, but I cannot see that this fact should have any influence in their construction. If they had been conveyed to different mortgagees, I should find it impossible to say which lien, if either, attached to these materials as soon as they were acquired by the company. It seems equally impossible, although both mortgages are to one trustee. The company evidently did not intend to annihilate itself, or its capacity to acquire and hold property, and I can see nothing in the nature and objects of the conveyances that should warrant the court in assuming an intention to include in them that to which their language does not extend.

The counsel for the appellant also relied on an estoppel, which he claimed to grow out of the following facts: After the execution of the mortgages under which the appellant claims, and also after the company had acquired the chairs in question,

it executed another mortgage to Jesup and Raymond, which was expressly declared to be subject to the two prior mortgages to the appellant. As the railroad company had these chairs when this last mortgage was made, so that they were conveyed by that as "materials," and as that was made subject to the two prior mortgages to the appellant, it is said that the company, and all claiming under it, are estopped from showing that the two prior mortgages did not include all that was conveyed by the Jesup and Raymond mortgage. Without stopping to inquire whether a prior mortgagee would be in a position to insist upon an estoppel growing out of a recital in a subsequent mortgage to other parties, which had in no degree produced or affected his position, we are clearly of the opinion that there is no estoppel in this case, from the language of the subsequent mortgage itself. It does not say that the mortgages to the trust company are prior liens upon all the property "herein described," but after referring to each of them specifically, says they are prior liens upon all the property "therein described, respectively," etc. This recital, therefore, does not profess to give those mortgages any more extensive application than they respectively purport to have, and can create no estoppel. If one having ten lots mortgages nine of them, and afterwards gives a mortgage upon all, subject to the prior mortgage upon the lots "therein described," this certainly could not extend the prior mortgage to the tenth lot, nor estop the mortgagor, or any one claiming under him, from showing that the tenth lot was not included in the first mortgage.

The only remaining question necessary to be considered is as to the form of the judgment taken by the defendant. The judgment was for the value, and not in the alternative for a return or the value, in case a return could not be had. This question was passed upon by this court in the case of *Pratt v. Donovan*, 10 Wis. 387, in which it was held that a defendant might, under the code and act of 1854, which was then in force, waive a return and take a judgment for the value. Since then, the act of 1854, referred to in that case, has been repealed in the general revision, leaving the question to depend on the provisions of the code in relation to judgments, which were also therein referred to. It is now insisted that the decision in *Pratt v. Donovan*, *supra*, depended on that act, and that the same conclusion cannot now be sustained. But we are of the opinion that the provisions of the code in relation to judgments, upon the construction of which

the decision in *Pratt v. Donovan*, 10 Wis. 387, mainly depended, sufficiently recognize the option of defendants in these actions to waive a return and take judgment for the value, where the property has been delivered to the plaintiffs. And that decision sufficiently states the reasons for this conclusion.

The statute makes the alternative judgment, in favor of a defendant, dependent on the condition that he "claims a return"; and we can give no effect to this clause, except by allowing an option to claim a return or not. Counsel construe it as a description merely of that class of defenses which, if established, would entitle the defendant to a return, as distinguished from those which would not. But it does not seem to us such as would have been used for that purpose. If that had been the design, the legislature would have said that where the defendant succeeded on an answer which would entitle him to a return, the judgment should be in the alternative. The language used seems much more aptly to describe the option which defendants had in such cases, by the law in force at the time the code was adopted, to waive a return and take judgment for the value, than it does the difference between pleas which entitle him to a return and those which do not. And we think there is reason and justice in preserving this option to defendants. The plaintiff has in effect the same option; for although he may not elect, after having brought his suit to obtain the property, to take a judgment for the value where a return can be had, he might have waived a return before bringing suit, and have sued for the value either in trespass or trover. And where the plaintiff has unjustly taken the defendant's property into his own possession, even though by the aid of a legal process there is no reason why the defendant, if he chooses, should not have the right to compel him to abide by the consequences of his own acts, and to pay for the property. Indeed, it might in many instances be oppressive to defendants to compel them to receive it back. Thus, suppose a contractor has procured certain articles with which to complete his contract, and some plaintiff replevies them, and gives the bond necessary to take possession. The litigation may last for years, but the contractor is bound to complete his contract immediately. He provides new articles for that purpose, and afterwards succeeds in the suit. Should he be bound then to take back the articles, when he had no longer any use for them? It seems to me not.

And the fact that plaintiffs might sometimes be compelled

to pay for property, and lose it afterwards, is no reason why the defendant should not be entitled to a judgment for the value. If the defendant in replevin had been sued in trespass, he might have been made to pay for the property, and yet some stranger might afterwards have taken it from him on proving a better title than the plaintiff in the trespass suit. This is a risk that all parties have to run. But it affords no reason why the judgment should not be according to the rights of the parties as they are made to appear in the suit. Possession was sufficient evidence of title in the defendant, until the defendant showed a better title. And if that possession would be sufficient to justify a judgment for a return of the property, it is equally sufficient to justify one for its value, and the defendant's option to take such a one ought not to be defeated for the purpose of allowing plaintiffs to resort to legal process to get possession of their neighbor's property with the least possible risk to themselves.

It is true, the statute does not provide what the judgment shall be, where the defendant does not claim a return. But as it was well understood that in all cases where a defendant was entitled to a return, the judgment was either for a return or the value, it was left as a necessary implication that where he waived a return the judgment could be only for the value. The statute does not say what the judgment shall be in cases where the defendant succeeds on a plea that does not entitle him to a return, as where he simply denies the taking. Yet as the only judgment to which he was ever entitled in such a case was a judgment for costs, the statute seems also to have left that to implication.

We think also that section 11, chapter 132, authorizes the jury to assess the value in all cases where they find that the defendant is entitled to a return, whether he waives the return or not.

The judgment is affirmed, with costs.

The principal case, as it first came before the court, is reported in *Farmers' Loan and Trust Co. v. Commercial Bank*, 11 Wis. 207. For other cases concerning the same mortgages and deeds of surrender executed by the railroad company, see *Dinsmore v. Racine etc. R. R.*, 12 Id. 649; *Farmers' Loan etc. Co. v. Cary*, 13 Id. 110; *Farmers' Loan etc. Co. v. Fisher*, 17 Id. 123.

SITUATION OF PARTIES AND NATURE AND OBJECT OF THEIR TRANSACTIONS MAY BE LOOKED AT IN CONSTRUCTION OF WRITTEN INSTRUMENT: *Gilman v. Henry*, 53 Wis. 470; but the court cannot look outside of the instrument to get at the intention of the parties, and then carry out that intention,

whether the instrument contains language sufficient to express it or not: *Hef v. Heller*, 53 Wis. 418; *Gillman v. Henry*, *supra*. The sole duty of construction is to find out what was meant by the language of the instrument: *Gross Bay etc. Co. v. Hewett*, 55 Id. 103. The principal case is cited or quoted to the foregoing points. And see, on this general proposition, *Ganson v. Madison*, *ante*, p. 659, and note thereto.

DEFENDANT IN REPLEVIN IS ENTITLED TO JUDGMENT FOR VALUE OF PROPERTY, if he prevails, where the plaintiff gets possession under the statute, and the defendant, by his answer, does not claim a return: *Klaty v. Delles*, 45 Wis. 490, citing the principal case; but where the defendant claims a return, he cannot have judgment for the value only: *Smith v. Coolbaugh*, 19 Id. 111, distinguishing the principal case.

SEAMANS v. CARTER.

[15 WISCONSIN, 548.]

STATUTES ARE NOT CONSTRUED SO AS TO OPERATE RETROSPECTIVELY, unless the intention that they should so operate is unmistakable; but that intention is not to be assumed from the mere fact that general language is used which might include past transactions, as well as future.

JUDGMENT WHICH IS LIEN UPON HOMESTEAD IS NOT AFFECTED BY SUBSEQUENT PASSAGE OF STATUTE, providing that the owner of a homestead "may remove therefrom, or sell and convey the same, and such removal or sale and conveyance shall not render such homestead subject or liable to forced sale on execution, or other final process hereafter issued on any judgment or decree"; and therefore the enforcement of such a judgment against a homestead, after a sale thereof, will not be restrained.

ACTION to restrain the sale of certain lands upon execution. The plaintiff had a decree in his favor. The facts are sufficiently stated in the opinion.

Sloan, Patten, and Bailey, for the appellants.

Charles G. Williams and H. K. Whiton, for the respondent.

By Court, PAINE, J. In *Hoyt v. Howe*, 3 Wis. 765 [62 Am. Dec. 705], this court held that under the homestead exemption law, as it then stood, a judgment against the owner became a lien on the homestead, which might be enforced by a sale whenever the property ceased to be a homestead. While that law was in force, a judgment was rendered against a party who afterward sold his homestead to the plaintiff in this suit. After such sale, the owner of the judgment was proceeding to sell on execution, and this suit was brought to restrain him. The question is, whether chapter 137, general laws of 1858 (R. S., p. 798), changed the law thus established in respect to judgments rendered before its passage.

The respondent's counsel assume it to be entirely clear that this act was intended to apply to judgments rendered before its passage, as well as to those rendered after. And their brief is devoted mainly to the proposition that it was competent for the legislature to pass a law with that effect. But we are satisfied that we cannot, consistently with the rules of construction, hold the act in question to have been intended to operate retrospectively. Statutes are never so construed, unless the intention that they should so operate is unmistakable: *Smith's Com.*, p. 679; *Sedgwick on Statutory and Constitutional Law*, pp. 188 et seq. That intention is not to be assumed from the mere fact that general language is used which might include past transactions as well as future. Statutes are frequently drawn in such a manner. Yet such general language is held to have been used in view of the established rule that statutes are construed as relating to future transactions, and not to past. This was the case with the statute of frauds. As originally passed, it enacted that "no action should be brought on any parol promise," etc. This language was general, and by its terms, included as well parol promises made before its passage as those that might be made afterwards. Yet the court held that only the latter were intended. Many other similar instances might be cited as illustrations of the general rule.

Yet all there is in the act under consideration indicating that the legislature intended to affect the operation of judgments previously rendered, is the mere use of general language that might include them. It provides that "the owner of a homestead, under the laws of this state, may remove therefrom, or sell and convey the same, and such removal or sale and conveyance shall not render such homestead subject or liable to forced sale on execution, or other final process, hereafter issued on any judgment or decree of any court of this state, or of the district court of the United States for the state of Wisconsin," etc. Now, it is true that the language, "any judgment or decree," is unqualified, and might be extended to past judgments as well as future. But without something more pointed to indicate an intention that it should have that effect, it must be assumed that the legislature used it with the knowledge that it would be construed in accordance with the rule above stated, and held to relate only to judgments or decrees thereafter rendered. They undoubtedly intended to change the rule established in *Hoyt v. Howe*, 3 Wis. 765 [62

Am. Dec. 705], but to change it for the future only. The language used is appropriate to that end. And though general enough to bear a construction giving it a retrospective effect, yet the intention that it should have such effect is not sufficiently apparent to take the case out of the general rule that the object of a law is to prescribe a rule to govern future transactions, and not to divest rights acquired in the past.

It may be that this law is more in harmony with, and more fully carries out, the constitutional provision concerning homestead exemption than the old law, construed as it was in *Hoyt v. Howe*, 3 Wis. 765 [62 Am. Dec. 705]. But this is not a sufficient reason to justify a change in the established rules of construction.

The judgment must be reversed, with costs.

RETROSPECTIVE OPERATION WILL NOT BE GIVEN TO STATUTE, unless the intention to give it such operation is clearly expressed: *Oyon's Succession*, 41 Am. Dec. 274, and note collecting prior cases; *Bruce v. Schuyler*, 46 Id. 447; *Baughner v. Nelson*, 52 Id. 694; *Grimes's Estate v. Norrie*, 65 Id. 545. The principal case is cited to this effect in *Finney v. Ackerman*, 21 Wis. 270; *Austin v. Burgess*, 36 Id. 190; *Vanderpool v. La Crosse etc. R. R.*, 44 Id. 663; but a remedial statute may have a retroactive effect, if it does not impair contracts, or disturb vested rights: *Klaus v. City of Green Bay*, 34 Id. 637, distinguishing the principal case.

THE PRINCIPAL CASE IS FOLLOWED in its construction of chapter 137, general laws of 1858 (R. S., p. 798), to the effect that the act does not apply to executions issued upon judgments which had become liens prior to its passage, in *Trustees of Baltimore Annual Conference v. Schell*, 17 Wis. 312; *Dopp v. Albee*, Id. 590; *Boorman v. Schöber*, 18 Id. 439.

GREENLEAF v. LUDINGTON.

[15 WISCONSIN, 558.]

HOLDER OF CERTIFICATE OF STOCK MAY MAINTAIN ACTION FOR DAMAGES AGAINST ONE, who, having assigned the certificate, causes the corporation to refuse to transfer the stock on its books by presenting to the corporation an affidavit that he had lost the certificate, and procuring a new certificate to be issued in its stead upon executing a bond "to save said company harmless from all loss of damage by reason of said second issue of stock, and from any liability on account of said certificates, and of stock described in said affidavit."

JUDGMENT IN FAVOR OF ONE WHO CAUSES CORPORATION TO REFUSE TO TRANSFER STOCK ON ITS BOOKS to the holder of the certificate thereof by presenting to the corporation an affidavit in which he falsely stated that he had lost the certificate, and procuring a new certificate to be issued in its stead, upon executing a bond of indemnity to the corporation, rendered in an action for the wrongful refusal, against him and the

corporation, brought by the holder of the certificate, is a bar to a second action against him, in which substantially the same facts are alleged, and he is asked to pay upon the bond of indemnity the amount of the judgment recovered in the first action against the corporation, which proved to be insolvent.

ACTION to recover the value of certain shares of stock. The defendant, Ludington, having assigned the certificate of stock in question for ten shares in the La Crosse and Milwaukee Railroad Company, presented to the company an affidavit, in which he stated that he had lost it and other certificates, and procured the issue to him of new certificates in their stead, upon executing to the company a bond conditioned "to save said company harmless from all loss or damage by reason of said second issue of stock to said Ludington, and from any liability on account of said certificates, and of stock described in said affidavit." The plaintiff, having purchased the certificate in question, requested the company to transfer the stock to him on its books, but the company refused to do so. The plaintiff alleged, and gave evidence to show, that Ludington requested the company not to transfer the stock, but Ludington denied that he made any direct request. After the refusal to make the transfer, the plaintiff asked Ludington to countermand his order to the company, and give his consent to the transfer, which Ludington promised, but failed to do. The plaintiff afterwards brought an action against the company to recover damages for its refusal to make the transfer, in which action Ludington was made a party defendant. The plaintiff recovered a judgment against the company, but Ludington had a judgment in his favor. Execution upon this judgment was returned unsatisfied, the company being insolvent. The plaintiff thereupon brought this action against Ludington, making the company also a defendant, in which he asked that Ludington be adjudged to account to him for the value of the ten shares of stock at the time of its presentation, with interest, and that the plaintiff might receive from the company the bond and all benefit thereof, and recover from Ludington the amount of the judgment against the company, with interest. The facts alleged and proved in the two actions were substantially the same; and evidence in the first action was, by stipulation, read upon the trial of the second. Ludington claimed that the judgment in his favor in the first action was a bar to the present action. Judgment was given for the plaintiff.

E. Mariner, for the appellant.

Smith and Salomon, for the respondent.

By Court, DIXON, C. J. The refusal of the defendant railroad company to transfer upon its books the plaintiff's certificate of stock was a tort for which the plaintiff was entitled to maintain his action in the nature of an action on the case against the company. He has in fact done so, and obtained a judgment for the damages suffered by reason thereof. The defendant Ludington was a party to that tort, and primarily responsible to the plaintiff for the damages sustained. He was the prime mover,—the exciting cause of the wrong, having for his own sole benefit given a bond of indemnity which led directly to its commission. He likewise was a defendant in the action against the company, but final judgment was rendered in his favor. The facts in the two actions, both in pleadings and proof, are the very same. In truth, the evidence in the former action was, by stipulation, read upon the trial of this. Ludington now sets up that judgment in bar of a recovery here, and I think the answer is good.

The rule of law is well stated by Beardsley, C. J., in *Davis v. Newkirk*, 5 Denio, 94, that all who direct, request, or advise an act to be done, which is wrongful, are themselves wrongdoers, and responsible for all damages. It is stated perhaps with more accuracy in *Judson v. Cook*, 11 Barb. 644, that all who bid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same act with their own hands. Every unlawful interference with, or assertion of control over, the property of another, is sufficient to subject a party to an action: *Wall v. Osborn*, 12 Wend. 39; *Phillips v. Hall*, 8 Id. 613 [24 Am. Dec. 108]; *Dreyer v. Ming*, 23 Mo. 434. The most frequent instances of the application of these principles are to be found in actions of trespass *vi et armis*: *Scott v. Shepherd*, 2 W. Black. 892; *Guille v. Swan*, 19 Johns. 381 [10 Am. Dec. 234]; *Leame v. Bray*, 3 East, 593. "To render one man liable in trespass for the acts of others, it must appear," says Spencer, C. J., in *Guille v. Swan*, 19 Johns. 381 [10 Am. Dec. 234], "either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally produced the acts of the others." But the doctrine is not limited to immediate and forcible injuries. The same reason applies

to those which are indirect and committed without violence; and so are the authorities. Opinions of the justices in *Scott v. Shepherd*, 2 W. Black. 892, and note, and the opinion of Lord Ellenborough in *Leame v. Bray*, 3 East, 593; *Clark v. Whitaker*, 19 Conn. 319 [48 Am. Dec. 160]. Gould, J., in *Scott v. Shepherd*, 2 W. Black. 892, says: "The whole difficulty lies in the form of the action, and not in the substance of the remedy."

Authorities are very numerous, that a request or indemnity to a sheriff, or other executive officer, to do an act or withhold property, which turns out to be wrongful, makes the party liable for all damages which may ensue: *Davis v. Newkirk*, 5 Denio, 94; and *Judson v. Cook*, 11 Barb. 644; *Root v. Chandler*, 10 Wend. 110 [25 Am. Dec. 546]; *Coats v. Darby*, 2 N. Y. 517; *Herring v. Hoppock*, 3 Duer, 20. And in such cases, the execution of a bond of indemnity by a stranger, or one having no interest in the process, but who signs as security merely, is said to be sufficient to charge him without evidence of any other interference: *Davis v. Newkirk*, 5 Denio, 94; *Herring v. Hoppock*, 3 Duer, 20.

It is impossible to distinguish between these cases and the one at bar. The refusal of the company to make the transfer resulted naturally and ordinarily from the giving of the bond of indemnity. The plaintiff alleges and proves this to have been so. Not only that, but he also alleges, and as I think proves, that Ludington requested the company not to transfer the stock. He did the same thing in the former action, but the judge, though he found the facts, decided as matter of law that there could be no recovery. That decision was no doubt erroneous, yet binding in all collateral proceedings.

It is true that Ludington then denied, and still does, that he made any direct request, and insisted that the refusal of the company was voluntary, and therefore he ought not to be held responsible. He likewise insisted, as in this action, that the bond of indemnity was given to protect the company from loss upon the new and not to prevent a transfer of the old stock. If it be admitted that there was no other request than such as is to be implied from the giving of the bond, that of itself is sufficient. No one will suppose that without the bond the company would ever have refused the transfer. That was the source, the *causa causans*, of all the trouble and damage which came to the plaintiff. It was, in effect, a continuing request to the company not to make the transfer, a constant

assertion that the old stock was his, the same as if he had been in the company's office when it was presented, and had said: "This stock belongs to me; do not transfer it, and I will indemnify you." Having given the bond to induce the company to issue the new stock, and thereby to repudiate the old, he cannot be allowed, when such repudiation actually takes place, to say that it was the mere voluntary act of the company. It was a matter in which the company had no interest, but acted exclusively for his advantage. As was said in *Coats v. Darby*, 2 N. Y. 517, he will not be permitted to show that the act was not the consequence of the request which the law adjudged to be part and parcel of the act itself. No man is allowed to incite another to a wrong, and after its commission to give his want of influence in evidence in bar of an action. Such a principle would enable a man to encourage another to commit murder in his presence, and then escape upon the ground that the homicide was malicious enough to have done the same thing if he had remained silent. The law, with a sounder morality, adjudges the abettor guilty of murder.

It furthermore appears that, after the refusal, the plaintiff called upon Ludington and requested him to go to the company and give his consent to the transfer, which he refused and neglected to do. That was enough to charge him with the consequences of the wrong, upon the principle of a subsequent ratification of an act done for his benefit.

As to the objection that the bond was given to protect the company from loss by reason of the issue of the new stock, and not to prevent a transfer or recognition of the old, it is true that such is its language. Nevertheless, the only method in which the company could with safety avail itself of the security afforded by it, was to reject the old stock. The bond recited that Ludington owned and had lost the old stock. If the company recognized it without suit in which it could be judicially established that Ludington did not own and had not lost it, it took upon itself the risk and trouble of proving these facts, the very thing which the bond was designed to guard against, and then if it failed, it would be wholly without security. Hence, it could not do otherwise than refuse, and if sued give Ludington notice to defend. The refusal, therefore, was the legitimate consequence of accepting the bond and issuing the new stock.

For these reasons, I am of opinion that the former judgment

is a bar to any recovery in this action. My brethren, however, are of opinion that there can be no subrogation or right of action in equity upon the bond at the suit of the plaintiff; that its proceeds were mere general assets in the hands of the company, and therefore that the action should be dismissed. There is some confusion in the authorities upon that subject, and my mind is not clear. Hence, I prefer to rest my judgment upon the grounds above stated, which to me are plain and intelligible, and about which I entertain no doubt. For if it be admitted that the plaintiff had a remedy in equity upon the bond, it was concurrent with that at law for the wrong, and the judgment in the one court bars a proceeding in the other.

The judgment of the court below must be reversed, and the case remanded, with directions that it be dismissed.

CORPORATION IS LIABLE FOR WRONGFUL REFUSAL TO TRANSFER STOCK: *Commercial Bank v. Kortright*, 34 Am. Dec. 317, and note.

LIABILITY OF ALL THOSE WHO PARTICIPATE IN WRONGFUL ACT: See *Kirkwood v. Miller*, 73 Am. Dec. 134, and extensive note. Joint tort-feasors are jointly liable: *Klauder v. McGrath*, 78 Id. 329, and note collecting other cases.

THE PRINCIPAL CASE IS CITED in *Riemer v. Schlitz*, 49 Wis. 277, to the point that one who is a surety for a mortgagor of chattels, and who pays the amount secured by the mortgage, and takes an assignment of it, is entitled to the possession of the property by subrogation to the mortgagee's rights.

JESUP v. CITY BANK OF RACINE.

[15 WISCONSIN, 604.]

ORDER SETTING ASIDE SALE ON FORECLOSURE OF MORTGAGE, IS AFFRANABLE in Wisconsin.

SUBSEQUENT REVERSAL OF JUDGMENT WILL NOT DIVEST TITLE OF STRANGER WHO PURCHASES AT SALE, and advances his money, when the sale is allowed to take place upon the judgment, without any steps taken to stay proceedings.

SALE ON FORECLOSURE TO PLAINTIFF IN JUDGMENT SHOULD NOT BE SET ASIDE ON SUBSEQUENT REVERSAL OF JUDGMENT, unless it is shown that there was some unfairness in the sale, or that the property would bring a larger amount on resale, when the sale is allowed to take place, without any steps taken to stay proceedings, and the reversal does not defeat the entire claim, but only reduces its amount; although the sale might be set aside, if the reversal shows that the plaintiff had no claim under the mortgage, and consequently no right to have the property sold at all.

ACTION to foreclose a mortgage executed by the Racine and Milwaukee Railroad Company to Jesup and Raymond. The

City Bank of Racine, and others, judgment creditors of the railroad company subsequent to the mortgage, were made defendants. A judgment of foreclosure was rendered, under which the mortgaged premises were sold to the plaintiff Jesup. The sale was afterwards confirmed. No steps were taken to stay proceedings. Subsequently the City Bank of Racine, and other judgment creditors, appealed from the judgment of foreclosure, and the judgment was reversed by the supreme court upon grounds which did not defeat the entire claim of the plaintiffs, but for error in the determination of the court below of the amount due under the mortgage. A motion was thereupon made to set aside the sale and the order confirming it. The motion was granted, and Jesup appealed.

Cary and Pratt, for the appellant.

Strong and Fuller, for the respondents.

By Court, PAINE, J. This is an appeal from an order setting aside a sale of a railroad on a mortgage foreclosure. It is objected that the order is not appealable. But such orders have always been held appealable here; and if a change is desired, it is for the legislature to make it: See *Carney v. La Crosse & M. R. R. Co.*, 15 Wis. 503.

The reason for setting aside the sale was that the foreclosure judgment on which it was made was afterwards reversed in this court. The general rule is conceded that when a sale is allowed to take place upon a judgment, without any steps taken to stay proceedings, the title of the purchaser will not be divested by a subsequent reversal of the judgment for error. There are authorities which make a distinction between cases where the purchase is by a stranger who advances his money. and those where it is by the plaintiff in the judgment. This distinction was sustained by this court in the case of *Corwith v. State Bank of Illinois*, 15 Wis. 289, where we held that the reversal of the judgment, which was a mere personal judgment, was a good reason for setting aside a sale where the plaintiff in the judgment was the purchaser. But the reason of the rule is, that the reversal of the judgment destroys the right to have the property sold at all; and if upon the merits, it shows that the plaintiff had no claim against the defendant. In such case, it is no more than just that a plaintiff who has acquired title to another's land on the strength of such a judgment, should restore it. He has advanced nothing, and

when his judgment fails, all pretense of right in him to hold the land seems to fail.

But the same reason does not exist in the case of a judgment of foreclosure, where the reversal, as in this case, did not defeat the entire claim, but only reduced the amount. There, a claim is still left. The mortgage itself creates a lien upon the land, and a liability to sale. If the sale in such a case is set aside, the only result is that it must be sold over again. Upon these grounds, we think the principle adopted in the case of *Corwith v. State Bank*, 15 Wis. 289, should not be applied to a sale on a mortgage foreclosure, where the reversal does not defeat the entire mortgage debt, even though the mortgagee be the purchaser. In such a case, it should be shown that there was some unfairness in the sale, or that the property would, on a resale, bring a larger amount than the bid at the first sale.

This being the only reason for setting aside the sale, the order is reversed, with costs.

The principal case, as it first appeared before the court, is reported in *Jessup v. City Bank of Racine*, 14 Wis. 604.

EFFECT OF REVERSAL OF JUDGMENT ON SALE UNDER EXECUTION: See *Deiano v. Wilde*, 71 Am. Dec. 687, and note; *Reynolds v. Harris*, 76 Id. 459; *Stroud v. Casey*, 78 Id. 556. The principal case is cited in *Corwith v. State Bank of Illinois*, 18 Wis. 565, to the point that where a judgment is reversed for error, a sale under the execution, if made to a stranger, will not be avoided because of such reversal; although it will be otherwise where a sale is made to the plaintiff in execution.

McBAIN v. AUSTIN.

[16 WISCONSIN, 87.]

ACTION CANNOT BE MAINTAINED FOR PRICE OF GOODS SOLD to be paid for by a specific article of personal property, unless the buyer has refused to deliver the specific article after a proper demand.

PROPER DEMAND SUFFICIENT TO SUSTAIN ACTION FOR PRICE OF GOODS SOLD by partnership, and to be paid for by a specific article, cannot be made by one partner without an order from his copartner, if the latter made the sale, and stipulated with the buyer that the article should, not be delivered except upon his order, and the buyer was unaware of the partnership.

ACTION by McBain and Foster against Austin to recover the price of a pump sold to the defendant. The pump was sold for fourteen dollars, and in payment the defendant was to deliver a cow and to receive four dollars. McBain demanded the cow of Austin, who refused to deliver it except upon an

order from Foster. Foster and McBain were partners; but of this the defendant was not aware. Foster made the sale, stipulating that the cow was not to be delivered to any one except upon his order. Upon these facts, judgment was rendered for the plaintiffs, and the defendant appealed.

Smith and Ordway, for the appellant.

Sloan and McFetridge, for the respondent.

By Court, COLE, J. It will probably not be contended that an action would lie for the value of the pump sold to the appellant, until he was in default in neglecting or refusing to deliver the cow according to the agreement. It is admitted that by the agreement they were to give the pump and four dollars, or thereabouts, for the cow. Since, then, the pump was not to be paid for in money, but by a specific article of personal property, it follows that the action cannot be maintained, unless the appellant has refused to deliver after a proper demand. It appears from the evidence that McBain made a demand for the cow, but we think it insufficient, for the reason that he had no written order from his partner, which, we think, was essential, according to the terms of sale. He says in his testimony, that when he demanded the cow of Austin the latter refused, because he had no order from Foster. And Austin himself says that Foster directed him not to let the cow go without his order. It is not pretended that McBain had any such order when he made the demand, and therefore, we are inclined to the opinion that Austin was not obliged to deliver it on that ground alone.

The answer which is made to this objection is, that McBain and Foster were partners, and that one had as much power and control over the partnership matters as the other. But this does not fully meet the difficulty. The question is, Assuming that McBain and Foster were partners, could not the latter bind the firm by the agreement which he made in respect to the delivery? The objection assumes that it was a condition of the sale that the cow should only be delivered on an order from Foster. Was it not competent for Foster to make such a condition, and bind the firm by it? We think it was. In the present case, there would seem to be strong reasons for holding such a condition binding upon the firm. The trade was made by Austin and Foster. It does not appear that the former knew that the latter had a partner. He did not know McBain, and as a matter of course, was ignorant

of the fact that he was Foster's partner, or had any right to the cow. Was he to take notice at his peril that McBain was Foster's partner, and deliver him the cow, when the only man he knew in the transaction had directed him not to deliver it without his order? Under these circumstances, we think he might reasonably and properly insist upon the presentation of a written order, as a condition of delivery. The sale was made upon such a condition, and a prudent man would, for his own safety, require that it be complied with. McBain swears that the appellant did insist upon it, and that he refused to deliver the cow because he had not the order. And not having this, he did not make such a demand for the cow as to put the appellant in default. It follows from this that the judgment of the circuit court must be reversed.

DIFFERENCE BETWEEN SALE AND BARTER: See *Fuller v. Duren*, 78 Am. Dec. 318.

NECESSITY OF DEMAND BEFORE ACTION: See *Nelson v. Bestwick*, 49 Am. Dec. 310, and note 313; see also *Higgins v. Emmons*, 13 Id. 41.

MECKLEM v. BLAKE.

[16 WISCONSIN, 132.]

BURDEN OF PROOF IN ACTION FOR BREACH OF COVENANT OF SEISIN is upon the defendant who answers that he was well seised, etc.

ACTION for breach of covenant of seisin. The opinion states the case.

Hugh Cumming, for the plaintiff in error.

A. M. Blair and W. A. Pora, for the defendant in error.

By Court, **COLE, J.** This was an action for a breach of a covenant of seisin. The form of the covenant was that the defendant was "well seised of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee-simple," etc. The complaint alleged that he was not so seised, and negatived the language of the deed. The defendant answered that he had performed the covenants of his deed, and that at the time of conveyance he was well seised, etc., following likewise the language of the deed. On the trial, the question was raised as to which party held the affirmative upon the issue, and was bound to sustain it by evidence. The court decided that the burden of proof was on

the plaintiff; that he had the affirmative of the issue, and must show that the defendant was not seised of an absolute and indefeasible estate of inheritance in the premises at the time of the conveyance. The plaintiff, not being prepared with this proof, was compelled to submit to a nonsuit. And the question is, Was the nonsuit right? We think not. The general rule is familiar to every lawyer, that the burden of proving any fact lies upon the party who substantially asserts the affirmative of the issue. And this, says Professor Greenleaf, is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable: 1 Greenl. Ev., sec. 74. Usually, in actions of covenant, the party suing proves the particular breach complained of; and it was probably a recollection of this rule which made the court hold in this case that the plaintiff must prove title out of the defendant. But a different rule seems to obtain in respect to actions on the covenant of seisin. The authorities seem to hold that in that case the rule as to evidence should correspond with the rule as to the pleadings, and that a knowledge of the state of title being supposed to rest with the defendant, he is bound to maintain the affirmative of his covenant.

In *Abbott v. Allen*, 14 Johns. 247, Justice Platt makes the following observations, which are apposite to the question we are now considering: "The marked distinction," says he, "between a covenant of seisin, and those for quiet enjoyment and general warranty, consists in this: that the covenant of seisin, if broken at all, must be so at the very instant it is made; whereas, in the latter covenants, the breach depends upon the subsequent disturbance and eviction, which must be affirmatively alleged and proved by the party complaining of the breach. A grantor who gives either of these covenants is not bound to deliver to his grantee the prior deeds and evidences of his title. Here the defendants covenanted that they had a good title. The legal presumption therefore is, that they retain or can produce the evidence of that title, if any. The grantee relied on that covenant; and until the grantors disclose their title, he holds the negative merely, and is not bound to aver or prove any fact in regard to an outstanding title. *Prima facie*, the grantee is to be presumed ignorant of the real state of the title. The grantors are not bound, unless by suit, to explain their title. It is enough that the grantee

suspects the grantor's title to be defective; he is not bound to wait in suspense until by possibility he can find out in whom the title really is."

It is true, the question in that case was one of pleading rather than evidence; but still the remarks of the court are applicable to the question before us. For here the defendant alleges that he was seised, at the time of conveyance, of a good, sure, absolute, and indefeasible estate of inheritance in the premises, and the evidence in relation to that title may be exclusively in his possession or under his control.

In *Swafford v. Whipple*, 3 G. Greene, 261 [54 Am. Dec. 498], the point was distinctly presented as to which party had the burden of proof in an action for the breach of the covenant of seisin. The court decided in that case that the burden of proof lay upon the defendant, who had the affirmative of the issue by the pleadings, and that he must first introduce evidence to sustain the issue, and that the plaintiff is not bound to prove that the defendant has not kept his covenants. It is likened to a case where a party pleads infancy, or a freehold in himself, in certain actions, where the *onus probandi* is upon him to establish that defense. See also *Glinister v. Audley*, T. Raym. 15.

The foundation of all these cases is the resolution in *Bradshaw's Case*, 9 Coke, 60, that it lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises than in the lessee, who is a stranger to it, and therefore the defendant ought to show what estate he had in the land at the time of the demise made. We think there is great force in this view of the matter, even under our registry laws, because no man is bound to put his title upon record unless he thinks proper. It therefore might be difficult, if not impossible, for the plaintiff to prove the negative proposition, that the defendant was not seised of an indefeasible estate in the land.

For this reason, we are of the opinion that the circuit court erred in holding that the plaintiff must prove the affirmative of the issue, and show title out of the defendant. The answer tendered an affirmative issue, in substance and effect, and the burden of sustaining it was upon the defendant.

The judgment of the circuit court is reversed, and a new trial ordered.

ONUS PROBANDI IS UPON DEFENDANT IN ACTION FOR BREACH OF COVENANT OF SEISEIN, where he pleads that he was lawfully seised of the prem-

ises: *Swafford v. Whipple*, 54 Am. Dec. 498, and note 503; see, however, *Pate v. Mitchell*, 79 Id. 114, and note 115; *Dickson v. Desir's Adm'r*, 66 Id. 661. The principal case is cited to this effect in *Beckmann v. Hean*, 17 Wis. 413; *Noonan v. Isley*, 21 Id. 144. In *Ingalls v. Eaton*, 25 Mich. 32, 34, however, it is held that in such a suit, where the breach is assigned in general terms, and the statutory general issue is pleaded, the mere production of the plaintiff's deed in evidence is not sufficient to maintain a recovery, and proof of the covenant does not cast the burden upon the defendant of proving his title; distinguishing the principal case on the ground of the difference of the issue therein presented.

CASSELMAN v. PACKARD.

[16 WISCONSIN, 114.]

LAW EXEMPTING FROM FORCED SALE QUARTER OF ACRE OF LAND in city or village with the dwelling-house thereon, and its appurtenances, does not exempt offices and stores erected thereon, and rented by the debtor, and the portions of the lot on which they are built.

HOMESTEAD EXEMPTION OF GIVEN QUANTITY OF LAND has regard to purpose for which it is used, and will not cover all the buildings which may be erected upon the land, whatever may be their character, or for whatever purposes they are designed, merely because the debtor lives in one of them.

HOMESTEAD EXEMPTION EXTENDS ONLY TO PORTION OF PROPERTY occupied as a homestead, whether such portion is to be severed from other portions by perpendicular or horizontal lines. *Per* Dixon, C. J.

ACTION to set aside sheriff's sale of portions of a village lot owned by the plaintiff, and claimed by him as exempt from execution sale, and to restrain the execution of a sheriff's deed therefor. Judgment was rendered for the plaintiff, and the judgment creditors, who were defendants in the action, appealed. The opinion states the case.

John J. Cole, for the appellant.

Montgomery and Tyler, for the respondent.

By Court, COLE, J. In this case there is a contest as to the extent of the exemption. The property is situated in the village of Sparta, Monroe County. The land does not exceed in quantity a quarter of an acre. There are situated upon it, besides the dwelling-house in which the respondent resides with his family, various other buildings, which are used and occupied for stores, warerooms, shops, school-rooms, offices, etc. The respondent rents those buildings for those purposes, and claims that the privilege of the homestead exemption applies to them. The circuit court sustained this view of the law.

We consider this decision clearly erroneous. We cannot be-

lieve the legislature ever intended that a person should hold all the buildings which might be erected upon a quarter of an acre of ground in a city or village, whatever might be their character, or for whatever purposes they were designed, under the homestead exemption law, merely because he might live in one of them. Such a construction seems to us most unreasonable. The statute exempts the given quantity of land, with the dwelling-house thereon, and its appurtenances. Of course, the exemption of that quantity of land has regard to the purpose for which it is used. It was supposed that this amount of land might be convenient and necessary for the comfort and enjoyment of the dwelling-house. Nor are we prepared to say that the entire quantity of land must be devoted exclusively to the use of the dwelling. In addition to the dwelling, a person perhaps might erect a small shop, or building of that character, on the lot, which he himself used and occupied for the purpose of his trade or business, without forfeiting the exemption. But it is not necessary to express any opinion upon that point in this case; for the testimony shows that there were various buildings on the lot, which he rented for offices, stores, schools, etc., and it is very clear that these were not exempt.

We believe that all was reserved to the respondent, on the sale upon the execution, that the law allowed him; and we therefore think his complaint should have been dismissed.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to dismiss the complaint.

DIXON, C. J. The only difference between this case and that of *Phelps v. Rooney*, 9 Wis. 70 [76 Am. Dec. 244], S. C., 12 Id. 698, is the difference between the perpendicular and horizontal lines of division of land, and according to the views which I then entertained (12 Wis. 698), I cannot but concur with my brethren here. I there endeavored to show, both on principle and authority, that Rooney's premises should have been divided by horizontal lines, so as to have saved the homestead and permitted the residue to be sold under the mortgage. The doctrine for which I then contended, I think now fully adopted by the court, the only ground of distinction being that the lines of division are perpendicular. This I believe to be untenable. Beside the authorities to which I then referred, I desire to call the attention of the profession to an article in the August number, 1862 (volume 1, new series; volume 10, old series, page 577), of the *American Law Register*, entitled *Hori-*

zontal Divisions of Land, and to the cases there cited. After stating the general rule that land conveyed by description of the lot, or certain boundary lines, will, without further lines, include structures of any number and value, and mines of any depth, the writer gives his opinion in these words: "But this is only a result of a *prima facies* or presumption, not of any legal impossibility of severing the house from the land, or one story of it from another, or mines from the surface. Just as there may be different owners of different cones, there may be different owners of different strata of the same cone. Different proprietorships of land may be bounded or defined by horizontal as well as perpendicular lines." This is a view of a writer who had evidently given the subject a very minute and thorough investigation. It seems to me extremely unreasonable, not to say absurd, to hold that the plaintiff, Casselman, shall now be deprived of so much of the "one fourth of an acre" exempted by statute, as is occupied by the buildings used for "stores, warerooms, shops, school-rooms, office," etc., because it happens that such portions of the premises can be separated from the residence by perpendicular lines, when, if he had chanced to so construct the buildings that his dwelling had been a story above or below those used for these various purposes, the whole would have been exempt, and his possession and ownership undisturbed. The use is nothing, but the form of the use is everything, in determining the question of exemption. I cannot but regard this as a most blind and unthinking devotion to mere form, with no shadow of substance. The plaintiff, desiring to retain the whole quarter-acre, free from the claims of the creditors, at the time of consulting the architect should also have consulted a lawyer, and then he could have so modeled his buildings as to occupy them for a dwelling, and at the same time devote the greater part to any other use or uses he saw fit, without endangering his privilege under the statute.

NATURE OF OCCUPANCY AS AFFECTING HOMESTEAD EXEMPTION, and whether portions of the property used or rented for business purposes are embraced within the exemption: See the note to *Pryor v. Stone*, 70 Am. Dec. 347-353, treating this subject, and citing the principal case at page 351; see also *Ackley v. Chamberlain*, 76 Id. 516, and note 518; and *Phelps v. Rooney*, Id. 244 (9 Wis. 70), where it was held that a part of a city lot and a building thereon, the upper stories of which were used as a dwelling, constituted a homestead which the husband could not mortgage without the signature of his wife, notwithstanding the lower portions of the building, which was situated on one of the principal business streets of the city of Milwaukee, were

leased as a store. In this case, Mr. Chief Justice Dixon, in a dissenting opinion, expressed his views concerning the horizontal division of homestead premises, which he reiterates in the principal case. In the note to this case, a synopsis is given of the dissenting opinion of the learned judge.

THE PRINCIPAL CASE IS CITED to the point that the owner of a legal subdivision of land precisely equal to the statutory measure of a homestead right, whose dwelling-house is situate upon such subdivision, and who has made no different selection, will be held to have selected that subdivision for his homestead, although he also owns adjoining lands from which he might have selected his homestead in part: *Kent v. Laseley*, 48 Wis. 263.

HERSEY v. BOARD OF SUPERVISORS OF MILWAUKEE COUNTY.

[15 WISCONSIN, 186.]

INTENTIONAL OMISSION OF TAXABLE PROPERTY OF CITY FROM ASSESSMENT ROLL invalidates taxes levied thereon, notwithstanding such omission is made by the assessor for the sole purpose of giving effect to an ordinance passed by the common council of the city in good faith, under the honest belief that it had authority to exempt such property from taxation, for the purpose of advancing the interests of the city.

UNINTENTIONAL OMISSIONS OF TAXABLE PROPERTY FROM ASSESSMENT ROLL arising from accident, mistakes of fact, erroneous computations, or errors of judgment, do not necessarily vitiate a tax levied thereon.

ONE SEEKING RELIEF AGAINST CERTAIN ILLEGAL TAXES LEVIED ON HIS PROPERTY must pay the legal taxes levied thereon before he is entitled to relief against the illegal taxes.

COSTS WILL NOT BE AWARDED ON APPEAL TO EITHER PARTY, where the point, on which the judgment appealed from is modified, was not made in the court below.

ACTION to restrain the execution and delivery of tax deeds on a sale of two lots, one in the fourth ward, and one in the seventh ward of the city of Milwaukee, for state, county, city, and ward taxes, for the year 1857, and to have canceled the certificates of sale. There was but one sale of each lot for the entire amount assessed upon it. There was a ward tax assessed on each of the lots in the wards in which they were situated respectively, and a special ward tax was levied on one of them. The relief was claimed on the ground that the assessors of the city of Milwaukee purposely omitted to assess and place on the assessment roll, for the year 1857, the Newhall House and the land on which it stood, in the third ward of the city, which was of the value of one hundred and fifty thousand dollars, and owned by a person other than the plaintiff, and that by the failure to levy taxes on this property the

taxes on the plaintiff's lots were increased. The answer, among other things, alleged that the common council of the city of Milwaukee passed an ordinance on the twenty-second day of March, 1856, in part as follows: "Sec. 2. In view of the great public benefit which the construction of said hotel will be to our city, and to encourage its early completion, said hotel property is hereby exempted from all city and ward taxes and assessments for the years 1856 and 1857; provided said building shall be completed within eighteen months from the first day of May, 1856"; but that it never was the purpose of the common council, or the assessors, to exempt this property from taxation for state, county, and school purposes. And it was alleged that the common council passed the ordinance in good faith, and under the honest belief that they had authority to do so, and to relieve the Newhall House property from city and ward taxes, if in their judgment the interest of the city would be advanced thereby. And the error of the assessors, if any, in omitting the property from the assessment roll, was made for the purpose of giving effect to the ordinance, and in the honest exercise of their best judgment as to their duties under the law. The plaintiff demurred to this answer, and judgment was rendered in his favor granting him the relief demanded. The defendants appealed.

Joshua Stark, for the appellants.

H. F. Prentiss, for the respondent.

By Court, COLE, J. The main question involved in this case, namely, as to what was the effect of omitting the Newhall House, upon the validity of the general taxes of 1857, has already been considered and passed upon in *Weeks v. City of Milwaukee*, 10 Wis. 242. It was there held that the effect of exempting that property from taxation, under the ordinance of the common council of the city, was to render these taxes invalid. The council for the appellants, however, in the able and elaborate argument which he addressed to the court, contended that there was a distinction between the cases, and that the ruling in *Weeks v. City of Milwaukee*, *supra*, did not necessarily dispose of this question as it is presented in this record. He supposes that it does not fall within the reason and principle of that decision, because it is alleged in the answer that the assessors omitted this property from the assessment roll in the honest belief that the common council, under the provisions of the city charter, had full power to ex-

empt it from taxation. But this is a misapprehension of the doctrine of that decision. It was a conceded point in that case that the omission of this property was intentional on the part of the city authorities. That is, they knew that this property was there, and that it was liable to taxation like other property, but from motives of liberality and to encourage the building of so large and commodious a public house, they attempted to exempt it entirely from taxation. It is here averred that the common council passed the ordinance in good faith, honestly believing that they had the legal power and authority to pass the same, and relieve the Newhall House property from city and ward taxes and assessments, if, in their judgment, the interest of the city would be advanced thereby; and for the sole purpose of giving effect to the ordinance, the assessors omitted the property from the assessment rolls. This does not essentially vary the question from the Weeks case. In both cases, it appears that the property was designedly and purposely omitted from the assessment rolls, and this circumstance takes them out of the rule of that class of decisions which hold that "omissions arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is intrusted, do not necessarily vitiate the whole tax." In other words, it is an intentional in contradistinction to an accidental omission of the property, which affects the validity of the tax. The rule must have this limitation, otherwise the citizen would have no relief, whether the taxing officers complied with the laws and constitution or not. Indeed, upon any other theory one might say that the greater the ignorance of those officers of their duties, and the more flagrant the violation of law in assessing and levying the tax, the more legal and valid it becomes. For suppose the common council of the city, for the purpose of inviting capital to their city, and encouraging its trade and commerce, should pass an ordinance exempting from taxation all the merchandise, money, and other property, in the honest belief that they had the legal power to do this, and the assessors, to give effect to such an ordinance, and supposing it was valid, should omit that class of property altogether from the assessment rolls, and only list the real estate,—would any one contend that such an error of judgment on the part of the officers, both as to their duties and powers under the law, would not invalidate the tax? Probably not. And why? Because the exemption of the property was in-

tentional, and the authorities undertook to suspend and nullify the laws in respect to it, which they obviously had no right to do. Yet does it render their action legal because they honestly supposed they had this power to go contrary to law? It seems to us not.

It is possible that cases may be found in conflict with this doctrine; but if so, we are not disposed to follow them. We prefer to adhere to the principle laid down in *Weeks v. City of Milwaukee*, 10 Wis. 242, as being more just, safe, and reasonable. For if public officers may disregard the law, and deliberately and purposely omit from the assessment rolls property which they know is liable to taxation, because by so doing they imagine some "great public benefit" will be secured, and still the citizen whose tax has been increased thereby can have no relief, but must pay the same, there would seem to be little value in laws regulating the levying and collection of public revenues. It might as well be left to the discretion or caprice of the officers to impose the burdens of taxation as they might think proper.

But it is insisted that if an intentional omission of property invalidates a tax, that the same result ought to follow when property is omitted through accident, mistake, or error of judgment, that the consequence to the citizen is the same in both cases, who has to pay more than his just proportion of the tax, and therefore, if he is not relieved in one case, he should not be in the other. If he is equally oppressed, why, it is asked, should a court of equity afford a remedy in the former contingency and deny it in the latter? Or what reason can there be in applying a different rule to the two cases?

In each case, a court of equity unquestionably considers the tax-payer equally injured, whether the omission by which his tax was increased were intentional or accidental. By either means, he is compelled to pay more than his just share of the expenses of the government. But in the one case the error arises from the fallibility of men, and the imperfection of human institutions. Revenue is essential to the support of government. The execution of revenue laws is necessarily intrusted to men who, at best, will make mistakes in levying and collecting taxes. The assessor will frequently fail to get a list of all the taxable property within his jurisdiction, however vigilant and careful he may be. This is unavoidable. But if the tax is always to be avoided because, through these mistakes and omissions, property subject to taxation has

escaped its proper burdens, then no tax could ever be collected. Hence the citizen, as the price of government and of social order, must sometimes pay more than his just share of taxes. It may be a hardship that he should do this, but this is more than counterbalanced by the advantages he receives from protection to his life, liberty, and property. But there is no necessity for public officers to disregard the law, and intentionally omit to list property. They know where the property is, and know that it is subject to taxation. But they purposely omit it from the assessment rolls for some reason, assuming that they may have power to exempt it. Therefore, a court of equity may with much propriety hold that an error unavoidable in its character must be submitted to in the one case, though the effect of it may be to improperly increase the burdens of taxation upon some, while it grants relief to one whose taxes have been increased by an intentional disregard of the laws on the part of those to whom their execution had been committed.

The cases are clearly distinguishable from each other, and the reason for exonerating a party from the payment of his tax in the one case does not exist in the other.

The counsel likewise supposed that the rule laid down in *Weeks v. City of Milwaukee*, 10 Wis. 242, was in conflict with the decisions in *Kelley v. Corson*, 11 Id. 1; *Mills v. Gleason*, Id. 470 [78 Am. Dec. 727]; *Warden v. Supervisors of Fond du Lac Co.*, 14 Id. 618; *Milwaukee v. Supervisors of Rock Co.*, 15 Id. 9. We do not so understand those decisions. In *Kelley v. Corson*, 11 Id. 1, it did not appear that the party resisting the payment of the tax was in any view injured by the unauthorized action of the board of equalization, even assuming that they erred in regard to their powers. He therefore had no ground of complaint. In *Mills v. Gleason*, Id. 470 [78 Am. Dec. 727], the objection was based upon a mere non-compliance with some directions of the statute, notwithstanding which the tax may have been entirely just and equal. It was held that such an objection, even if well founded, did not vitiate the tax. In *Warden v. Supervisors of Fond du Lac Co.*, 14 Id. 618, and *Milwaukee v. Supervisors of Rock Co.*, 15 Id. 9, the error complained of did not increase the taxes which the parties were bound to pay. In each case, the amount of tax which the party ought to pay was readily ascertained from the complaint itself, or the court was able to say, from the complaint, that the error or inequality operated to the benefit, instead of injury, of the resisting

tax-payer. It is very obvious that those cases did not present a strong ground for equitable interposition. But no such reason exists, in this case, for denying the respondent relief. However, we think he is only entitled to relief upon condition of paying the taxes which are legal, and which, in justice, he ought to pay.

He states in his complaint that there were certain special and ward taxes assessed against his lots, which, of course, could not be changed or affected by the omission of the Newhall property, as that was situated in another ward. Why should he be exempt from paying those taxes? He knows the amount, and has not attempted to impeach or question their justice or correctness, except that there was an omission of property in another ward. But how could such omission affect the ward and special taxes? Clearly it could not. And therefore, before a court of equity will cancel the certificates, and perpetually restrain the proceedings, it seems but just to require the respondent to pay the taxes which are valid, and to which there does not appear to be any objection: *Warden v. Supervisors of Fond du Lac Co.*, 14 Wis. 618, and *Miltimore v. Supervisors of Rock Co.*, 15 Id. 9.

Upon the same ground it was contended that the respondent should be compelled to pay his just share of the general tax of 1857, which should have been assessed against his property. It is claimed that by the public records and other means it can be precisely ascertained how much those taxes were increased by the error complained of. It is very clear that no such question is in this case, for the reason that no testimony was offered on the trial; and it is impossible for us to say, upon the record, whether the matter was susceptible of computation or not. It would seem to involve the necessity of a reassessment of the property of the city, and a readjustment of the taxes for that year in order to ascertain the amount which each tax-payer ought to pay. But whether this is so or not, we are not called upon to decide, because the question is not presented by anything in this record. Not so, however, in respect to the special and ward taxes. The respondent shows what they amount to in the complaint itself. He therefore ought to pay the legal taxes, before he is entitled to relief against the illegal taxes.

The judgment of the circuit court must be modified, so as to conform to this decision; but without costs to either party,

because the point upon which the judgment is modified was not made in the court below.

Judgment accordingly.

UNINTENTIONAL OMISSIONS OF TAXABLE PROPERTY FROM ASSESSMENT ROLL, arising from mistake or error of judgment, will not invalidate tax: See *Williams v. School District*, 32 Am. Dec. 243, note 247; and no objection which does not go to the very groundwork of the tax so as to affect materially its principle, and show that it must be necessarily unjust and unequal, ought to have the effect of rendering the tax invalid: *Mills v. Gleason*, 78 Id. 721, and note 729. And therefore a court of equity will not interfere to declare a tax invalid, and restrain its collection, unless the objections to the proceedings are such as go to the very groundwork of the tax, and necessarily affect materially its principle, and show that it must necessarily be unjust and unequal: *Hart v. Smith*, 44 Wis. 218, citing the principal case. In *Marsal v. Supervisors*, 42 Id. 510, the court say, citing the principal case: "Of course, assessments are as liable to error as other processes. Assessors may commit errors of judgment and mistakes of fact. So that these are exceptional, and happen in good faith, not affecting the principle or the general equality of the assessment, they will not vitiate it." And so discriminations in the valuation and assessment of property, arising from mistake of fact or errors in computation or judgment on the part of assessors, do not necessarily vitiate a tax, but an intentional disregard of law in such discrimination does: *Brauns v. City of Green Bay*, 55 Id. 115, citing the principal case. So an assessment void, because part of the taxable property has been omitted, cannot be validated by legislative enactment: Note to *People v. Seymour*, 76 Am. Dec. 530.

WHEN VALID AND VOID TAXES ARE SEPARABLE, and the amount of the former can be readily ascertained, then the resisting tax-payer must pay those which are legal as a condition to being relieved from the payment of the illegal tax: *Bond v. City of Kenosha*, 17 Wis. 288; *Kachler v. Dobberpuhl*, 46 Id. 483, citing the principal case.

BEAL v. PARK FIRE INSURANCE COMPANY.

[15 WISCONSIN, 241.]

ACTS AND DECLARATIONS OF AGENTS OF INSURANCE COMPANY, AT TIME OF TAKING RISK and renewing the same, are admissible in an action on an insurance policy, notwithstanding the rule concerning parol evidence affecting written contracts, for this rule must yield to the rule that the company cannot take advantage of the mistakes and omissions of its agents within the scope of their employment.

INSURANCE POLICY IS NOT AVOIDED BECAUSE OF MISSTATEMENTS OF MATERIAL FACTS contained therein, where it is filled out, issued, and renewed by the agents of the insurance company upon a personal inspection and survey of the premises, there being no fraud or misrepresentation on the part of the insured.

ACTION on a policy of insurance issued by Hyer as the agent of the defendant to Seaman, and by him assigned to the plain-

tiff after the loss. The policy purported to insure Seaman against loss or damage by fire to the amount of twelve hundred dollars "on his stock of furniture, cabinet and upholstery ware, and materials and other merchandise kept and used by him, not hazardous and extrahazardous," contained in a five-story brick building, in the city of Milwaukee, etc., "east and west walls entire." The policy was afterwards renewed for one year, during which the loss happened. The answer alleged that by the policy Seaman represented and warranted that the east and west side walls of the building were entire, whereas there were two openings and doors in the west wall which increased the risk; also that it was agreed by the policy that if the building should be used for the purpose of carrying on any trade or vocation denominated hazardous or extrahazardous in the policy, except upon the terms therein provided, the policy should cease and be of no effect so long as the building should be so used; that upholstery manufacturing and cabinet making were among the trades denominated extrahazardous in the policy; and that for some time before and at the time of the loss, Seaman used a part of the building for carrying on those trades contrary to the conditions of the policy, and that the fire originated in the part of the building so used. At the trial, the plaintiff's counsel called Seaman as a witness, and asked him to state how the policy was procured. This question was objected to. The objection was overruled, and the defendant excepted. The witness answered: "A man by the name of Hyer came to my office and solicited me to insure in that company. Hyer went through the building, made a survey, and filled out this policy, and I have no recollection of making a written application." Plaintiff's counsel then asked the witness to state whether, at the time this survey was made, the building was occupied in the same manner as at the time of the fire. Objected to. Objection overruled, and exception. The witness answered in the affirmative. And he was also allowed to testify against the objection of the defendant's counsel that the openings in the wall were the same at the time of the survey as at the time of the fire. Seaman further testified that he gave no direction as to the form and filling up of the policy, and did not look at it, except at the outside of it, when it was renewed, and that Mr. Hatch came down to his office and made a second survey, and after that the renewal receipt was executed. The defendant excepted to the admission of all of this testimony. Hatch,

who was an insurance solicitor for the defendant, and who filled out the renewal, which was signed by Alexander, one of the agents of the company, testified on the part of the plaintiff that he made a survey of the building before the renewal, and that there were the same openings in the wall at that time as at the time of the fire, and that the business of cabinet and upholstery manufacturing was carried on in the building. The defendant excepted to the admission of this testimony. The defendant called Seaman, who testified to the two openings used as doors in the west wall of the building, and to the use of the upper story for upholstery, and also that the fire originated in the upholstery room. The court instructed the jury to find for the plaintiff, to which the defendant excepted. And verdict and judgment being for the plaintiff, the defendant appealed.

E. Mariner, for the appellant.

Cary and Pratt, for the respondent.

By Court, DIXON, C. J. The company had ratified the acts of Hyer as their agent to solicit insurance. Hyer filled out the policy; it was subsequently renewed by an agent, whose authority was not questioned, and its due execution was not denied by the answer. The company could not ratify for its benefit, and repudiate when adversely interested. The evidence of Hyer's acts and declarations at the time the risk was taken, together with those of the renewing agent, Hatch, and also the testimony of the latter, were properly received, unless, as urged by counsel, they should have been excluded on the ground that they contradicted the written contract set forth in the policy and conditions annexed. There is little doubt that such was the effect; yet without intending to question the rule that parol evidence is inadmissible to vary written instruments, we are of the opinion that the evidence was properly received. That rule is encountered by, and as we think must yield to, another rule in this case, which is, that no one should take advantage of his own mistake or wrong to the injury of another who is innocent. The policy was issued and renewed at the solicitation of the company, without written application on the part of the insured, and upon the personal inspection and survey of the premises by its agents. There is no pretense of fraud or misrepresentation on the part of the insured,—that he did anything to deceive or mislead the agents, or to prevent their acquiring full knowledge of the

nature and extent of the risk. Everything was done in the full belief that, after visiting the premises, the agents were competent to and would so fill up the policy as to make it valid between the company and the insured. They saw, or might have seen, the openings in the walls, and knew the uses to which the building was put, and which remained unchanged to the time of the fire. With this knowledge, or means of knowledge, they delivered, and subsequently renewed, the policy, and received the premiums. If they did so intending the policy to be void, it was a gross fraud. If it was a mistake, the condition of the company is no better. In either case, it is precluded from taking advantage of the acts of its agents done within the scope of their employment. For these reasons, we think the testimony was admissible, and that the judgment should be affirmed. *Hough v. City Fire Ins. Co.*, 29 Conn. 10 [76 Am. Dec. 581], presented a similar question. The applicant described the property in his written application as "his house," and it was so described in the policy. The policy contained this condition: "If the interest in the property to be insured is not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void." The legal title to the property was in another, with whom the insured had, at the time of the application, made a parol contract for its purchase for a price agreed upon, a part of which had been paid, and the insured was in possession. The application was filled out by an agent of the company. Upon the claim of the company, in a suit upon the policy, that the insurance was void by reason of the omission of the insured to state in the application the condition of the title, parol evidence was admitted to show that the insured stated to the agent the exact facts as to the state of the title. The ground of admission was, that the mistake was that of the agent, of which the company ought not to be allowed to take advantage, notwithstanding the general rule that all parol statements are merged in the written contract.

Judgment affirmed.

INSURANCE COMPANY IS CHARGED WITH KNOWLEDGE, WHEN APPLICATION FOR INSURANCE is taken by an agent of the company, and he is aware of the facts material to the risk: *Campbell v. Merchants' etc. Ins. Co.*, 72 Am. Dec. 324, and note 331; *Phelps v. Cattaraugus County M. I. Co.*, Id. 526, note 528; *Hough v. City Fire Ins. Co.*, 76 Id. 581, and note 589; see *Clark v. Union Mutual Fire Ins. Co.*, 77 Id. 721, and note 724. Where an agent of an insurance

company, acting within the general scope of the business intrusted to him as such agent, fills up, in his own language, an application for insurance, from the statements of the insured fully and truthfully made, receives the premium, and issues a policy duly executed by the insurer on such application, the insurer will not be permitted, when a loss happens, to defeat the policy by denying the truth of the application, nor the authority of the agent in the transaction, although he has transcended his authority, unless the insured is chargeable with knowledge of his having exceeded his authority: *Insurance Co. v. McGeekey*, 33 Ohio St. 568, citing the principal case. And so where an agent inserted in an application for life insurance a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the assured, it was held to be the act of the company, and not of the assured, and did not invalidate the policy: *Insurance Co. v. Wilkinson*, 13 Wall. 235, citing the principal case. And an insurance company cannot avail itself of any misstatement or omission in the application, constituting a warranty on the part of the assured, where such application is prepared by the agent with knowledge of the facts, or he is intrusted by the assured to make the application; and this is so, even though the by-laws of the company, made known to the assured, provide that the person taking the survey and preparing the application shall be the agent of the applicant: *Miner v. Phoenix Ins. Co.*, 27 Wis. 701; *Meckler v. Phoenix Ins. Co.*, 38 Id. 671, citing the principal case. And as to the effect of such by-laws, see the note to *Clark v. Union Mutual Fire Ins. Co.*, 77 Am. Dec. 724, where the subject is treated. The principal case is also cited upon the point that one cannot take advantage of his own negligence or fraud, in *Wellauer v. Fellows*, 48 Wis. 109, where it is held that one who receives goods sent to him, knowing that the sender claims that the receiver has purchased them of him, cannot, in the absence of mistake or fraud, appropriate them to his own use, and then disclaim the purchase.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WARFIELD v. CAMPBELL.

[38 ALABAMA, 527.]

JUDGMENT CREDITOR ACQUIRES LIEN BY SERVICE OF WRIT OF GARNISHMENT ON JUDGMENT DEBTOR OF HIS DEBTOR, which the garnishee cannot defeat by afterwards acquiring an equitable set-off against the judgment. ATTORNEY HAS LIEN ON JUDGMENT OR DECREE OBTAINED BY HIM FOR HIS CLIENT, to the extent of his fees, or compensation for his services in the cause, which is superior to an equitable set-off afterwards acquired by the defendant.

BILL in equity seeking to establish set-off against judgment. The facts are sufficiently stated in the opinion.

John Hall, for the appellant.

P. Hamilton and George N. Stewart, for the defendants.

By Court, A. J. WALKER, C. J. The appellant by his bill asked to set off a part of a judgment wherein Mrs. Witherspoon is plaintiff, and David L. Campbell defendant, against a judgment of Campbell against himself. Of the judgment in favor of Mrs. Witherspoon, he claimed to be the equitable owner to the extent of \$1,071.61. The set-off was allowed, except as to a part of Campbell's judgment on the appellant sufficient to discharge certain bills of cost, a judgment of Woodruff and Huntington, and the fees of counsel who procured the judgment of Campbell against the appellant. The argument here attributes to the chancellor an error only in restricting the set-off so as not to cover an amount sufficient to pay the judgment of Woodruff and Huntington, and the counsel fees above specified.

Did Woodruff and Huntington, and the counsel of Campbell, have a right of satisfaction out of the judgment of Campbell against appellant, prior and superior to the right of the appellant to have Campbell's judgment against him satisfied by setting off against it his interest in the judgment of Mrs. Witherspoon against Campbell? Before this question can be decided, it must be ascertained at what time the interest of the appellant in the judgment against Campbell accrued. On the 19th of May, 1859, Mrs. Witherspoon, in writing, authorized the appellant to collect her judgment on Campbell, and to retain such an amount as would reimburse him certain sums paid out by him for her. This transaction gave rise to the appellant's equitable interest in the judgment upon Campbell. It is true that before that time, and on the tenth day of February, 1859, the appellant paid for Mrs. Witherspoon certain sums of money, and he expected to reimburse himself from the money which might be collected from Campbell; but it is not alleged that Mrs. Witherspoon then authorized the appellant so to reimburse himself, or in any way transferred an interest in the judgment to him. Besides, if the appellant had, on the 10th of February, 1859, acquired an interest in the judgment corresponding with the sums then paid by him for Mrs. Witherspoon, the question would not be changed. For the sums so paid on the 10th of February, 1859, were so small that after the reimbursement of them to the appellant out of the judgment on Campbell, there would remain more than enough of that judgment to satisfy Woodruff and Huntington, and the counsel fees above stated. It is certain, therefore, that the appellant did not acquire any interest which would conflict with the claims of Woodruff and Huntington, and the counsel of Campbell, until the 19th of May, 1859.

The judgment of Campbell against the appellant was rendered on the 25th of March, 1859; and on the same day a garnishment was issued in favor of Woodruff and Huntington, judgment creditors of Campbell, against the appellant, as Campbell's debtor, which garnishment was answered by appellant on the 5th of April, 1859. Afterwards, and in January, 1860, Woodruff and Huntington obtained judgment against the appellant, as the defendant in garnishment. This judgment the appellant sought by his bill to perpetually enjoin, upon the ground that his equitable right of set-off was superior to Woodruff and Huntington's claim to a satisfaction of their judgment upon Campbell, out of the judgment of Campbell against the appellant.

By the garnishment, which was issued and answered before the appellant acquired his equitable set-off, Woodruff and Huntington obtained a lien *pro tanto* upon the debt due Campbell (their debtor) by the appellant. This lien would arise upon the service of the garnishment. It certainly attached in this case upon the filing an answer, which was a waiver of service: *Crawford v. Clute*, 7 Ala. 157 [41 Am. Dec. 92]; *Dore v. Dawson*, 6 Id. 712; *Skipper v. Foster*, 29 Id. 330 [65 Am. Dec. 405]. The garnishment gave to the creditors of Campbell a lien upon the judgment of their debtor against the appellant; and the appellant could not defeat it by acquiring afterwards a set-off. The chancellor, therefore, committed no error in giving precedence to the lien of Woodruff and Huntington over the appellant's set-off.

The remaining question to be examined is, whether the charges of Campbell's counsel, in procuring the judgment against the appellant in favor of Campbell, were entitled to satisfaction out of that judgment, in preference to the appellant's claim to have it appropriated to the judgment of Mrs. Witherspoon on Campbell. Besides the lien on papers and upon funds collected, an attorney has a lien upon the judgment or decree recovered, for the services rendered in procuring such judgment or decree: *Cross on Lien*, 32 Law Lib. 218; *Montague on Lien*, 53, 57; 2 Kent's Com. 641; *Story on Agency*, 507, sec. 838; *Ward v. Wordsworth*, 1 E. D. Smith, 598; *Turwin v. Gibson*, 8 Atk. 720; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; *Wilkins v. Battorman*, 4 Barb. 47; *Mitchell v. Oldfield*, 4 Term Rep. 123.

In England, the legal profession has the two distinct departments of attorneys and advocates. Of the advocates there are two species,—barristers and sergeants. In theory, the services of advocates are gratuitous, and their fees are *quid-dam honorarium*. The attorney's fees are the only charges which are actionable, or legally coercible. These are taxed as a part of the cost. It was a necessary consequence that the attorney's lien applied alone to taxed cost. As there were no other charges cognizable by the courts, it was simply impossible to further extend the lien. It is intimated by expressions made *arguendo* in *Long v. Lewis*, 1 Stew. & P. 229, that the lien here can have no greater extent than the taxed cost, notwithstanding the principle of the common law is here repudiated, and the charges of counsel are with us the subject of contract, and like charges for services in other departments

of business, capable of enforcement in the legal tribunals. And many decisions in American courts deny the existence of any lien, where there is no taxation of costs on account of the attorney, and restrict it to the cost, where its taxation is authorized by law: *Ex parte Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Id. 507; *Ocean Ins. Co. v. Rider*, 22 Pick. 210; *Wright v. Cobleigh*, 21 N. H. 339; *Currier v. Boston and Maine R. R.*, 37 Id. 223; *Hill v. Brinkley*, 10 Ind. 102; 18 U. S. Dig. 91, sec. 43; *Davenport v. Ludlow*, 4 How. Pr. 337; *Benedict v. Harlan*, 5 Id. 347; *Walton v. Dickerson*, 7 Pa. St. 376.

We think these decisions proceed upon an incorrect view of the reason upon which the lien is restricted in England to the taxed costs. It was so restricted because there was no right to legal coercion for the collection of any fees, save those taxed as a part of the cost. That reason failing, the result flowing from it ought also to fail. The attorney's lien was allowed, not because his costs were taxed, but it is founded in the natural equity which forbids that a party should enjoy the fruits of the cause, without satisfying the legal demands of his attorney: *Wilkins v. Carmichael*, Doug. (Mich.) 100; Cross on Lien, 28; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368. The taxed costs of the attorney, in England, had no merit or justice superior to the claim of counsel for a reasonable compensation in this day and country; nor did the former contribute more to the success of the party he represented than does the latter under our system. Every reason, therefore, upon which the lien was founded in England, applies to the counsel fees in this country; and therefore the liens should be incorporated in our jurisprudence as a security for the compensation of counsel.

When the taxation of attorney's cost was abandoned in New York, and the rate of compensation was left by the law to be governed by contract, Judge Shankland and Judge Willard decided that the lien no longer existed in that state: *Davenport v. Ludlow*, 4 How. Pr. 337; *Benedict v. Harlan*, 5 Id. 347. But the question afterward arose in the court of common pleas, and in the court of appeals of New York; and in both cases the decisions of Judge Shankland and Judge Willard were reviewed, in arguments which it seems to us conclusively refuted their reasoning, and the lien was allowed: *Ward v. Wordsworth*, 1 E. D. Smith, 598; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368. In other states, numerous cases are to be found in which a lien in favor of counsel has been allowed, for

the security of charges not taxed as cost: *Pope v. Armstrong*, 8 Smedes & M. 214; *McDonald v. Napier*, 14 Ga. 89; *Carter v. Bennett*, 6 Fla. 214; *Andrews v. Morse*, 12 Conn. 444.

While we cannot affirm that there is any preponderance of authority in favor of the proposition that the attorney's lien extends to the fees of counsel not embraced in the taxed costs, we feel constrained to maintain that proposition, because it best comports with the principle of justice out of which the attorney's lien sprung.

Upon the question whether the attorney's lien is superior or subordinate to the defendant's right of set-off, there was in England, and is in this country, a singular contrariety of decision. Upon that question, the courts of common bench and chancery, and the court of king's bench in England, and Chancellor Kent and Chancellor Walworth in New York, ruled differently: *Vaughan v. Davies*, 2 H. Black. 440; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; 2 Kent's Com. 641; *Nicoll v. Nicoll*, 16 Wend. 446; Story on Agency, sec. 383; *Dunkin v. Vandenberg*, 1 Paige, 622; *Porter v. Lane*, 8 Johns. 357; *Gridley v. Garrison*, 4 Paige, 647. It is not necessary that we should consider it in this case. The set-off as to which the controversy arises in this case was acquired after the rendition of the judgment. To such a set-off, it is plain that the attorney's lien must be superior, whatever may be the rule as to a set-off existing when the judgment is rendered. The authorities which are above cited in this opinion show that the attorney is regarded as an assignee of the judgment, at least at the date of its rendition, to the extent of his fees. Being an assignee at that date, he has an older equity than that acquired by a set-off of later acquisition; and the maxim, *Qui prior est in tempore, potior est in jure*, applies in his favor.

The appellant has other matter of set-off against Campbell, which we have not noticed in this opinion, because its date is subsequent to the judgment of Campbell, and it is therefore controlled by the principles which we have announced.

Decree affirmed.

RIGHTS OF PARTIES ON GARNISHMENT depend upon condition of things as existing at time of service of writ: *Williams v. Androscoggin etc. R. R. Co.*, 58 Am. Dec. 742.

SERVICE OF GARNISHMENT ON DEBTOR OF DEFENDANT creates a lien on the debt for the satisfaction of the demand, which cannot be divested by any arrangement between the defendant and garnishee: *Cottrell v. Farnum*, 38 Am. Dec. 323.

RIGHTS OF GARNISHEE: See *Walters v. Washington Ins. Co.*, 63 Am. Dec. 451, and note 456.

LIEN OF ATTORNEY ON JUDGMENT: See *Dodd v. Brett*, 66 Am. Dec. 541, and note.

ATTORNEY'S LIEN DOES NOT ATTACH IN SUIT until rendition of judgment therein: *Newbert v. Cunningham*, 79 Am. Dec. 612; and it extends only to such fees and disbursements as are taxed and included in the execution: *Id.*

ATTORNEY HAS LIEN FOR HIS FEES UPON MONEY OR PAPERS of his client while they are in his hands: *Dubois's Appeal*, 80 Am. Dec. 478; but possession is indispensable to his lien: *Id.*, and note 481.

THE PRINCIPAL CASE IS CITED to the point that an attorney at law has a lien on a judgment for any reasonable fees due to him by his client for professional services rendered in its recovery, in *Ex parte Lehman*, 59 Ala. 632; *Jackson v. Olopton*, 66 Id. 33; and is cited to the same point, but the doctrine dismented from, in *Streyke v. Beveridge*, 52 Ill. 263.

ROBERTS v. STRANG, ADRIANCE, & Co.

[38 ALABAMA, 386.]

AGREEMENT BY CREDITOR OF FIRM TO RELEASE ONE PARTNER FROM LIABILITY, OR COVENANT NOT TO SUE HIM FOR TWENTY YEARS, on his giving security for the payment of a portion of the debt, does not operate to release or discharge the other partners.

ACTION against Roberts as a partner in the firm of Lewis and Porteous, on two notes executed by said firm, payable to the plaintiffs. On the trial, the parties agreed upon a state of facts substantially as follows: That said firm, before the commencement of this suit, concluded to close up its business, and the defendant left the store, and all the goods, effects, and credits in the hands of the partner Porteous, for the purpose of paying off the debts; that Porteous entered into an agreement with some of the creditors, including the plaintiffs, that they should take his notes indorsed by one Price, who was not a member of the firm, for forty cents on the dollar, of their indebtedness; that the creditors thereupon released to Porteous all right to resort to any of the goods and effects, and the goods were mortgaged to Price to secure his indorsement; and that a covenant was entered into by the creditors not to sue Porteous for twenty years, and he and Price afterwards disposed of the goods. The court instructed the jury "that such a state of facts constituted no defense to the action, and no ground for a reduction of the plaintiffs' demand, except that the taking of the notes, indorsed by Price, for forty per cent of the indebtedness of the firm was a discharge of

such indebtedness to that extent." Defendant excepted, and assigned error.

John T. Taylor, for the appellant.

J. L. Smith, for the appellees.

By Court, *STONE, J.* In the case of *Browning v. Grady*, 10 Ala. 999, this court said: "The agreement of the creditor to discharge one partner, on his securing the payment of a portion of the debt, but reserving the right to proceed against another partner, does not operate to discharge the latter." Of similar import are the following cases: *Couch v. Mills*, 21 Wend. 424; *Dean v. Newhall*, 8 Term Rep. 168; *Rowley v. Stoddard*, 7 Johns. 207; *Lane v. Owings*, 8 Bibb, 247; *Catskill Bank v. Messenger*, 9 Cow. 37; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Durell v. Wendell*, 8 N. H. 369; *McClellan v. Cumberland Bank*, 24 Me. 566.

We find nothing in this record which takes this case out of the operation of the rule thus stated. All that the creditor did was to bind himself not to sue the appellant's copartner, Porteous, in twenty years. The assignment of the merchandise to Price was only intended as a security to him against the liability he incurred for Porteous on forty per cent of the debts due to Strang, Adriance, & Co. The goods were not, except to that extent, placed beyond the reach of Roberts, the appellant; and every cent of the debt secured by Porteous was, to that extent, a benefit to Roberts. If Porteous, or Porteous and Price conjointly, afterwards disposed of those goods without paying the partnership liabilities, we cannot perceive how this result can be traced to any agency of Strang, Adriance, & Co., or how they are to be held accountable for such disposition.

The judgment of the circuit court is affirmed.

EFFECT OF RELEASE OF ONE JOINT DEBTOR: See *Williamson v. McGinnis*, 52 Am. Dec. 561; *Winslow v. Brown*, 80 Id. 633, and note 640, where the cases are collected.

WRIGHT v. MOORE.

[28 ALABAMA, 598.]

ADVERSE ENJOYMENT, FOR TEN YEARS, of the privilege of damming up the water of a stream so as to raise the level without overflowing the banks, is sufficient, in Alabama, to create the presumption of a right, which a court of equity will protect.

EASEMENT ACQUIRED BY PRESCRIPTION IS RESTRICTED to the extent of the user.

THERE CAN BE NO PRESCRIPTIVE RIGHT TO MAINTAIN PUBLIC NUISANCE, and no period of enjoyment can legalise the continuance of a mill-pond which is injurious to the health of the surrounding community.

RIPARIAN PROPRIETOR HAS RIGHT TO ABATE AS NUISANCE a dam erected on the stream below him, and which throws back the water upon his lands. The proper mode of abatement is to lower the dam, if there be a prescriptive right for it, to the height authorised by the prescription, or in the absence of prescription, to such a height as will stop the refluxence of the water at his boundary line.

INFUNCTION WILL LIE TO RESTRAIN PARTY FROM DIVERTING WATER OF STREAM, by means of a ditch extending into his land, whereby the water is diverted from machinery, which is valuable and extensive, giving employment to a large number of persons.

BILL in equity seeking to restrain the defendants from diverting the water from a stream, on which the plaintiffs had erected valuable and extensive machinery. Bill dismissed, and decree of dismissal assigned as error. The opinion states the material facts.

John S. and E. W. Kennedy, and Goldthwaite, Rice, and Semple, for the appellants.

James Irvine, contra.

By Court, A. J. WALKER, C. J. The chancellor's decree, dismissing the complainants' bill for want of equity, is the only matter for examination in this court. No question as to the sufficiency, responsiveness, and effect of the answer, or as to the truth of the bill, is before us. We are simply to inquire whether the allegations of the bill make a case for equitable jurisdiction. If they do, the decree is erroneous; if they do not, it is correct. We are, on this appeal, to regard the allegations as truths; and will therefore, in this opinion, so speak of them.

The complainants have a dam upon a certain stream, directing to their machinery the water which constitutes its propelling power. This dam backs up the water on the land of some of the defendants, but does not cause it to overflow the banks of the stream. A dam, about fifty feet below the present one, was erected by a former proprietor more than twenty

years before the complainants were disturbed in the use of the water. At a time intermediate between the erection of the latter and the former, another dam was built. The present dam was erected less than ten years before the commencement of this suit; and it is higher by less than six inches than the previous ones. Whether the first two dams, or either of them, backed up the water on the defendants' land, is not disclosed by the bill. It does not, therefore, affirmatively appear that the natural flow of the stream upon the defendants' land was interrupted until the last dam was built. We cannot infer, because the last dam extends the refluxence on the defendants' land, that therefore the former dams, of less height and different position, had the same effect. Indeed, we are without the *data* for an argument upon the subject; for the bill is silent as to the degree of fall in the stream, and as to the extent to which the water is thrown back upon the defendants' land. We only make out that the present refluxence reaches the defendants' premises from the statement that a ditch upon their land extends into the pond. The disclosure of the bill is, that there has been, by aid of three successive dams, a continuous use of the stream for propelling machinery; and that this use has, since the erection of the last dam, and for a period less than ten years, disturbed the accustomed flow of the stream upon the defendants' land.

Since the 7th of February, 1843, ten years has been the period of limitation to actions for the recovery of land: Clay's Digest, 329, sec. 92; Code, sec. 2476. By analogy to this statute, the adverse enjoyment, since its adoption, for the prescribed length of time, of the privilege of throwing the water of the stream back upon the defendants' land, would create the presumption of a right to such enjoyment, which a court of chancery would protect: *Stein v. Burden*, 24 Ala. 130 [60 Am. Dec. 453]; 3 Kent's Com. 443; *Wright v. Howard*, 1 Sim. & St. 190-203. It is sufficient to authorize the presumption that the complainants, and those through whom their title has come down to them, have together had the continuous enjoyment for the prescribed period. It is a legal right of every riparian proprietor to have the stream flow through his land in its natural channel, without obstruction, or interruption, or even an alteration of its level: Angell on Watercourses, secs. 95, 340; *Wright v. Howard*, 1 Sim. & St. 190; *Stein v. Burden*, 29 Ala. 127 [65 Am. Dec. 394]; *Hendricks v. Johnson*, 6 Port. 472. The throwing back of the water of a stream upon another's

land, so as to impede its current and raise its level, would be an actionable infringement of his right, notwithstanding the water might still be confined within the banks. The privilege of so throwing the water back without overflowing the banks, is an easement,—a right which could as well be acquired by ten years' enjoyment, as a right to inundate the land of a super-riparian proprietor. Therefore, the adverse enjoyment for ten years of the privilege of extending a reflux confined within the banks of the stream on to the defendants' land would create the presumption of a right.

It is clear that the complainants do not, by the allegations which we have heretofore noticed, bring themselves within the principle above stated; for it is not shown that any enjoyment, challenging and adverse to the right of defendants, or those under whom they hold, was exercised until the last dam was erected, within the period of ten years.

This defect in the allegations is not remedied by anything found in the bill. It does assert that the complainants, and those under whom they claim, have had the exclusive adverse enjoyment of the water of the creek, "in the same way," for more than twenty years. This assertion can be reconciled with the allegation that the present is higher than the former dams, and in a different location, only by understanding it to refer to the uses to which the water is appropriated, and not to the agency by which it is made available. We therefore regard it as a statement that the water had been enjoyed by them and their predecessors for more than twenty years in propelling machinery, and not that during all that time the same elevation had been given to the water, and the same reflux produced.

It seems that the elevation of the water in the canal caused by the present dam is only three inches greater than that caused by the previous dams; and it is, perhaps, a reasonable inference that the increased reflux above the dam cannot be much greater. It is argued that this increase of elevation is so small as to be immaterial, and that the present elevation must be justified by a long-continued previous enjoyment of one so slightly smaller. This argument cannot be sound. It is not shown that the previous dams caused any reflux upon the defendants' land. It is impossible that an enjoyment, which did not disturb any right, could become the predicate of a prescriptive right to throw back the water upon the defendants' land.

But even if the bill had shown that the two first dams

backed up the stream upon the defendants' premises, and that the easement had been enjoyed for more than ten years, it would not follow that a right to increase the extent of the refluxence, even by so small an additional elevation as three inches, would be acquired. The law does not make it indispensable to the establishment of a prescriptive right that the mode or manner of using the water should have been precisely the same through the period of prescription. On the contrary, variations in the use, not materially prejudicial to other owners, do not interfere with the prescription: 3 Kent's Com. 443. But this doctrine has no relation to the question whether an adverse enjoyment can be increased in its extent beyond the limits of the use which gives the right by prescription. A right conferred by deed would be limited by the terms of the grant: Angell on Watercourses, 148, 149. Certainly the argument is as strong for a like limitation of the extent of the right acquired by prescription; and we accordingly find that the authorities carefully restrict the easement acquired by prescription to the extent of the user: *Id.*, secs. 224-226; *Stiles v. Hooker*, 7 Cow. 266; *Baldwin v. Calkins*, 10 Wend. 167; *Darlington v. Painter*, 7 Pa. St. 473; *Stein v. Burden*, 24 Ala. 130 [60 Am. Dec. 453]. If the dams which existed ten years before the disturbance alleged in the complainants' bill produced a refluxence upon the defendants' land then there might be a prescriptive right to that extent; but an increase of the refluxence, by an additional elevation within ten years, would be an unauthorized invasion of another's right.

In dismissing the subject, we deem it proper to remark that there can be no prescription for a public nuisance, and that no length of enjoyment would legalize the continuance of a mill-pond destructive to the health of the surrounding community: *Mills v. Hall*, 9 Wend. 315 [24 Am. Dec. 160].

The defendants, by a ditch upon their own land, withdrew the water from the creek, and returned it below the complainants' land, thus depriving the latter of the stream. The pond was a private nuisance to the upper proprietors, to the extent to which the water was thrown back upon their land, by reason of the increased elevation of the last dam, and its change of location. To this extent, they had a right to abate the nuisance, but to no greater extent. They had a right to lower the surface to the level at which it was before the erection of the last dam; and the regular and proper mode of doing it would have been by lowering the dam: Angell on Watercourses, secs. 390, 391; *Moffett v. Brewer*, 1 G. Greene, 348; 1 Bishop's

Crim. Law, sec. 700; *Rex v. Pappineau*, 1 Strange, 686; *Welch v. Stowell*, 2 Doug. (Mich.) 332. The right is, to "abate only so much of the thing as makes it a nuisance." The right of the defendants was to lower the level so that the refluxence would only be so great as the complainants had a right to produce. In the absence of a prescriptive right, they might lower the level, so that the reflow would stop at their boundary line. If there is a prescription, the depression of the level might be carried so far as to stop the refluxence with the limit of the adverse user for ten years.

The defendants have not, according to the statements of the bill, done what we have above decided they had a right to do. They have diverted the stream from the complainants' land by a ditch; that ditch has been stopped up by complainants, and they intend to continue to open it as often as it is stopped. Their purpose is to divert the water from the complainants' machinery, which is valuable and extensive, and gives employment to a large number of hands. Upon these facts, irreparable mischief to the complainants, and a multiplicity of lawsuits, would result, unless a court of chancery interposes. We decide, therefore, that the bill makes out a proper case for an injunction, restraining the defendants from diverting the stream from the complainants' premises. For principle involved, we refer to *Burden v. Stein*, 27 Ala. 104 [62 Am. Dec. 758]; 2 Story's Eq. Jur., sec. 925; Angell on Watercourses, sec. 444. No question arises as to a parol license to build the last dam to its present height, for the bill shows that the party who is alleged to have given the present license had no title to the land to be affected.

Reversed and remanded.

PREScriptive RIGHT TO LAND, HOW ACQUIRED: See *Webber v. Chapman*, 80 Am. Dec. 111, and cases collected in note 118.

PREScriptive RIGHT TO MAINTAIN DAM CAUSING OVERFLOW OF ANOTHER'S LAND: *Oswell v. Thayer*, 38 Am. Dec. 400; *Williams v. Nelson*, 34 Id. 45; *McCoy v. Danley*, 57 Id. 684.

WHAT CONSTITUTES ADVERSE ENJOYMENT OF INCORPORAL HEREDITAMENT: *Klein v. Gehring*, 78 Am. Dec. 565.

PREScriptive RIGHT IS NEVER ALLOWED TO EXTEND BEYOND ADVERSE USER: *Roundtree v. Bramley*, 73 Am. Dec. 470.

REMEDIES AGAINST NUISANCES: See *Aldrich v. Howard*, 80 Am. Dec. 638, and cases collected in note 638; *Mohr v. Gault*, 78 Id. 687.

NUISANCE CANNOT BE LEGALIZED BY LAPSE OF TIME: *Dygert v. Schenck*, 35 Am. Dec. 575; *People v. Cunningham*, 43 Id. 709.

THE PRINCIPAL CASE IS CITED TO THE FIRST POINT STATED IN THE SYLLABUS, IN *Nininger v. Norwood*, 72 Ala. 285.

RAISLER v. SPRINGER.

[28 ALABAMA, 702.]

PERSON PROCURING ILLEGAL ACT TO BE DONE BY ANOTHER IS CO-TRESPASSER with the person employed to perpetrate the wrong, and is equally responsible with him to the person injured, although not actually present when the trespass is committed; and the acts and declarations of the agent in performing such unlawful service are competent evidence against the principal.

WITNESS MAY LEGALLY TESTIFY, AS MATTER OF FACT, that a seizure of property by an officer without lawful authority "was made in an offensive and insulting manner."

ACTION to recover damages for the unlawful taking of certain goods and chattels, the property of the plaintiff. The seizure of the property was made by a constable, and although the defendant was not present, he admitted that he had told the constable to levy on the property. The court refused to admit evidence offered by the plaintiff that the seizure of the property was made in "an offensive and insulting manner," and plaintiff assigned error. Other statements appear in the opinion.

J. W. Shepherd, for the appellant.

James Robinson, contra.

By Court, R. W. WALKER, J. The appellant's bill of exceptions purports to set out all of the evidence, and presents the defendant in the attitude of a party who employs an agent to seize the property of another, without any authority for so doing. One who thus procures an illegal act to be done by another, is a co-trespasser with the party employed to perpetrate the wrong, and is equally responsible with him to the person injured, although not actually present when the trespass is committed; and the acts and declarations of the agent, in performing such unlawful service, are competent evidence against his principal. It is a familiar principle, applicable alike in civil and in criminal cases, that where several persons combine for the same illegal purpose, anything said or done by one of the confederates, in the prosecution of the common design, is in legal contemplation the act of all: *Abney v. Kingland*, 10 Ala. 361 [44 Am. Dec. 491]; *Johnson v. State*, 29 Ala. 62 [65 Am. Dec. 383]. It is upon this principle that, if two persons are guilty of a joint trespass, and one of them, in the commission of it, does acts which would authorize the jury to give exemplary damages against him, the other is liable to the

same extent: *Hair v. Little*, 28 Ala. 247; *Layman v. Hendrix*, 1 Id. 212. The manner in which an act, constituting a trespass, is committed, whether offensive and insulting, or otherwise, is inseparably connected with, and forms, indeed, a part of the act itself; and upon the principles just laid down, it must be competent evidence against the party by whose direction the trespass is committed, as well as against the agent by whose hand the injury is actually inflicted: See, further, *McClung v. Spotswood*, 19 Id. 165; *Nelson v. Cook*, 19 Ill. 440; *Parkerson v. Wightman*, 4 Strob. 363.

The court rejected the evidence, showing that the seizure of the property was made by Vest in "an offensive and insulting manner," on the ground that it was the statement of an opinion, or legal conclusion. In this, we think, the court erred. The manner in which an act is done—whether rude and offensive, or kind and pleasant—is a matter of fact, open to the observation of the senses, to which a witness may legally testify. In *Carroll v. State*, 23 Ala. 28 [58 Am. Dec. 282], the statement of a witness that, in replying to a certain question, the prisoner's "manner was short," was held to be admissible.

As the defendant has made no cross-assignment of errors, the questions raised by the bill of exceptions taken by him on the trial are not now before us. Whether the judgment and execution referred to in that bill of exceptions are competent evidence for the defendant, and if so, whether in case of the introduction of both, or either of them, in evidence, the rule which makes the act and declarations of one co-trespasser evidence against another, could be considered applicable to this case,—are matters on which we must not be understood as having expressed an opinion.

As the rulings of the circuit court are in conflict with the principles we have laid down, its judgment must be reversed, and the cause remanded.

PERSON COMMITTING TRESPASS BY COMMAND OF ANOTHER is liable to an action therefor: *Woodbridge v. Conner*, 77 Am. Rep. 263.

LIABILITY OF TRESPASSERS IS JOINT AND SEVERAL: *Blann v. Crocheron*, 54 Am. Dec. 203, and see note 205. All are liable who participate in the wrongful act: *Ross v. Fuller*, 36 Id. 342; *Kirkwood v. Miller*, 73 Id. 134.

WHO ARE CO-TRESPASSERS: *Kirkwood v. Miller*, 73 Am. Dec. 134, and note 137, where the subject is fully discussed.

AM. DEC. VOL. LXXXII—47

CASES
 IN THE
SUPREME COURT
 OF
CALIFORNIA.

KEANE v. CANNOVAN.

[21 CALIFORNIA, 291.]

CONVEYANCE TO PLAINTIFF IN EJECTMENT, WHO RELIES ON PRIOR POSSESSION as evidence of title, is admissible in evidence, in connection with proof of entry and occupation under it, for the purpose of showing the extent and boundaries of the premises of which he claimed possession, although no title is shown in the grantor at the time of the execution of such conveyance.

TAX DEED IS NOT ADMISSIBLE AS EVIDENCE OF TITLE WITHOUT PROOF that all the requirements of the law authorizing its execution have been complied with.

STATUTE MAKING TAX DEED PRIMA FACIE EVIDENCE OF TRANSFER OF TITLE of the delinquent can apply only to deeds executed upon a sale for taxes levied subsequent to its enactment.

NO PRESUMPTION IS INDULGED THAT OFFICER ACTING UNDER NAKED STATUTORY POWER, with a view to divest upon certain contingencies the title of the citizen, has done his duty and complied with the law; the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed.

PRESUMPTIONS IN FAVOR OF TAX DEED FROM LAPSE OF TIME since its execution, and the possession of the grantee under it, can be indulged only in favor of acts between the assessment and the execution of the tax deed; but no presumption can be indulged in favor of the assessment itself, which is the foundation of all subsequent proceedings. It is only the intermediate proceedings, if any, that can be presumed in such cases.

ALLEGATIONS IN COMPLAINT IN FORMER ACTION, BROUGHT BY PLAINTIFF against his agent to recover damages for permitting premises to be sold for taxes, that by reason of the neglect of the agent the premises were sold and redemption was not made; that the sale thereby became absolute, and that in consequence he sustained damages, — are not admissible in evidence, in an action of ejectment, as an admission of title in the purchaser at the tax sale; nor, even if they amounted to an admission, would they operate to transfer such title.

TAX DEED IS PROPERLY EXCLUDED FOR UNCERTAINTY IN DESCRIPTION, where the property is therein described as "a lot on Dupont Street, 137 feet and 6 inches from the northwest corner of Washington Street, with the improvements thereon, — 12 x 100."

DESCRIPTION OF PROPERTY IN TAX DEED MUST BE CERTAIN IN ITSELF, and not such as to require evidence *abunde* to render it certain.

PAYMENT OF TAXES BY GRANTEE IN TAX DEED for a portion of the time he was in possession under such deed, is not of itself, disconnected with other circumstances, evidence that the owner has abandoned the property.

VALUE OF IMPROVEMENTS CANNOT BE SET OFF AGAINST DAMAGES in ejectment, where no foundation is laid in the allegations of the answer for any proof on the subject.

QUESTION OF ABANDONMENT OF PROPERTY IS ONE OF INTENTION of which the jury is to judge exclusively, and in order to do so they must take into consideration all the facts and circumstances before them.

ABANDONMENT MAY BE INFERRED IN SOME CASES FROM LAPSE OF TIME, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises; but in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession.

WHEN PERSON, WHEN HE CEASES TO OCCUPY PREMISES IN PERSON, LEAVES AGENT in charge of them, this fact is in itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them; and to render the question whether, in fact, he did or did not abandon them, one for the consideration of the jury.

PARTY WHOSE POSSESSION WAS ACQUIRED BY INTRUSION UPON PRIOR RIGHTS of another cannot invoke the protection of the Van Ness ordinance, by which the city of San Francisco relinquished and granted all her claim and title to certain lands, to the parties in the actual possession thereof, by themselves or tenants, during the period named in the ordinance.

APPELLATE COURT WILL NOT DISTURB VERDICT MERELY BECAUSE EVIDENCE IS CONFLICTING, or because the court, looking at the testimony as written down, would have come to a different conclusion from that reached by the jury, who had the witnesses before them.

POSSESSION OF REAL ESTATE IS EVIDENCE OF SEIZIN IN FEE in the party in possession, and no further or higher evidence of title is required to enable a plaintiff claiming under him to recover in ejectment, until the defendant shows an anterior possession, or traces title from a paramount source.

DEFENDANT IN EJECTMENT IS NOT RELEASED FROM LIABILITY FOR USE AND OCCUPATION because he is a mere tenant of another, and has paid rent to him. The plaintiff must look to the occupant of the premises for compensation for their use, and the occupant's recourse, in such case, is upon his landlord.

EJECTMENT. The opinion states the case.

Earl Bartlett, for the appellant.

H. S. Love, for the respondent.

By Court, FRIED, C. J. This is an action for the possession of certain real estate situated within the city of San Francisco. The plaintiff bases his right to recover upon title as evidenced by the possession in 1850 and 1851 of one Mondolet, through whom he claims. The defendants rely upon two tax deeds, one executed by the treasurer of the county of San Francisco, in March, 1851, and the other executed by the tax collector of the city and county of San Francisco, in June, 1858, and upon an alleged abandonment of the premises by Mondolet, and the operation of the Van Ness ordinance. On the trial, the plaintiff produced and gave in evidence, against the objection of the defendants, a conveyance of the premises from one Ramirez to Mondolet, executed in April, 1851, and then proved that Mondolet was in the possession of the premises in 1850, and occupied them until June, 1851; that during this period there was a two-story building thereon, which Mondolet used as a restaurant until it was destroyed by fire; and that the defendants were in the possession at the commencement of the action. The plaintiff also gave proof of the value of the use and occupation.

The tax deeds offered by the defendants, and the evidence in connection with them, were excluded upon the objection of the plaintiff. Proof of the payment of taxes, as evidence of ownership by the defendants and of abandonment by Mondolet, was rejected; and the alleged abandonment was submitted upon other proof as a question of fact to the jury. The court refused to admit evidence of the value of the improvements as a set-off to the damages claimed, and held that the Van Ness ordinance had no operation in favor of the defendants. The jury found for the plaintiff, and assessed his damages at three hundred dollars, and judgment was entered upon the verdict.

Various errors are assigned for a reversal of the judgment. These arise upon the ruling of the court below in admitting the conveyance from Ramirez to Mondolet; in excluding the tax deeds and evidence offered in connection with them; in rejecting proof of the payment of taxes and the value of the improvements; and upon the instructions to the jury on the question of abandonment, and the operation of the Van Ness ordinance; and upon the refusal of a new trial for the alleged insufficiency of the evidence to justify the verdict.

1. The conveyance from Ramirez to Mondolet was admissible, as showing the extent and boundaries of the premises

of which Mondolet claimed possession. If Ramirez had no title, of course no title passed by his conveyance, and the defendants were not prejudiced by its introduction in evidence.

2. The tax deed of the county treasurer, executed in March, 1851, was inadmissible without preliminary proof that all the requirements of the law authorizing its execution had been complied with. The statute which makes a tax deed *prima facie* evidence of the transfer of the title of the delinquent, had not then been passed. That statute only applies to deeds executed upon a sale for taxes subsequently levied. Nor was any presumption to be indulged that the treasurer, and the officers whose acts preceded his, had complied with the law. It was not a case in which presumptions could be indulged that the officers had done their duty. They acted under a naked statutory power, with a view to divest, upon certain contingencies, the title of the citizen, and in all such cases the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed: *Williams v. Peyton*, 4 Wheat. 78; *Varick v. Tallman*, 2 Barb. 113. Nor was any presumption to be indulged that all the preliminary steps had been followed from the length of time the deed had been executed, and the grantee had been in the possession of the premises. There are many transactions of which it is impossible or extremely difficult, after the lapse of little time, to produce the proper evidence, and in favor of the regularity of which presumptions are, in consequence, made by the law. "Thus," says Greenleaf, "where an authority is given by law to executors, administrators, guardians, or other officers, to make sales of lands upon being duly licensed by the courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings, the lapse of sufficient time (which in most cases is fixed at thirty years) raises a conclusive presumption that all the legal formalities of the sale were observed. The license to sell, as well as the official character of the party, being provable by record or judicial registration, must in general be so proved, and the deed is also to be proved in the usual manner; it is only the intermediate proceedings that are presumed. *Probatis extremis præsumentur media*. The reason of this rule is found in the great probability that the necessary intermediate proceedings were all regularly had, resulting from the lapse of so long a period of time, and the acquiescence of the parties adversely interested, and in

the great uncertainty of titles, as well as the other public mischiefs, which would result if strict proof were required of facts so transitory in their nature, and the evidence of which is so seldom preserved with care. Hence, it does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which therefore must be proved, or their loss accounted for and supplied by secondary evidence": 1 Greenl. Ev., sec. 20. If, in accordance with the reasons thus stated by Greenleaf, presumptions could be indulged in support of any of the preliminary acts essential to the exercise of the power of sale by the county treasurer, in the present case, they could only be indulged in favor of the acts between the assessment and the execution of the tax deed; none could be indulged in favor of the assessment itself, which was the foundation of all subsequent proceedings. The assessment, consisting in the listing and valuation of the property for the purpose of taxation, was also matter of record kept by the assessor, and delivered by him to the auditor of the county. From it, after it had been corrected by the board of equalization of the county, the duplicate was prepared, upon which the treasurer proceeded to demand the tax and sell the property. This record of the assessment was not produced, nor was any evidence offered of the assessment, or of any of the acts made by the statute essential prerequisites to the sale. The validity of the deed of the treasurer was rested upon presumptions in favor of the acts of public officers, and the lapse of time since it was executed and the grantee has been in possession of the premises.

In connection with this tax deed, the defendants offered the complaint of Mondolet, in an action brought by him against one Dufan, as constituting an admission of title in the defendant Dumartheray. It was rejected as evidence for the purpose stated, but was subsequently admitted as evidence of abandonment. The action was brought to recover damages from Dufan, who was Mondolet's agent, for having allowed the premises to be sold for taxes. In the complaint, the plaintiff alleges that in consequence of the neglect of his agent, the premises were sold, and redemption was not made, and that the sale thereby became absolute, and that he had in consequence sustained damages to the amount of fifteen hundred dollars. These statements do not amount to an admission of title in the purchaser at the tax sale, and even if they did,

the admission would not operate to transfer such title. They only show that Mondolet believed that he had suffered to a certain amount from the negligence of his agent.

The tax deed from the collector of the city and county of San Francisco, executed in June, 1858, was properly excluded for uncertainty in the description by which the property was assessed and sold, as set forth in the deed itself. The description is as follows: "A lot on Dupont Street, 137 feet and 6 inches from the northwest corner of Washington Street, with the improvements thereon,—12 x 100." This description does not state where Dupont or Washington streets are situated,—whether in or out of the city of San Francisco. But assuming that streets by these names exist in the city of San Francisco, it does not appear in which direction from the northwest corner of Washington Street the lot assessed is distant 137 feet and 6 inches. Nor does the description give the dimensions or form of the lot, or show in what direction its lines run after the distance from Washington Street is reached. The figures "12 x 100" in the deed are as unintelligible as so many hieroglyphics, whatever technical meaning may be attached to them by the custom of auctioneers, assessors, and property holders in the city of San Francisco. In advertising the property for sale, the collector follows the description in its assessment, and the assessor is expected to give, and should give, the description in ordinary language, and not by signs in use by a particular class in a particular locality. The figures may apply to different standards of measurement,—to inches, feet, or varas,—and by all these standards the dimensions of property are given in conveyances in San Francisco. It is not sufficient that a similar description, in a contract or conveyance between individuals, might be shown by parol evidence to have been intended for particular premises. The description must be certain of itself, and not such as to require evidence *aliunde* to render it certain. The statute requires the collector, in his publication of the delinquent list, to give "such a condensed description of the property that it may be easily known": Revenue Act of 1857, sec. 15. A description which cannot be made intelligible without resort to extrinsic evidence is not one of this character. Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to

be sold. All subsequent proceedings depend upon this certainty. An inaccurate or an uncertain description defeats every step subsequently taken, and as we have already said, the uncertainty cannot be cured by evidence *aliunde*. "A description," says Blackwell, "sufficiently clear to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree a specific execution, will not answer in the proceedings to enforce the collection of a tax. In the case of private transactions, the courts, in construing the documents, endeavor to collect the intention of the parties, and give that intention effect. If a latent ambiguity exists in the description, parol evidence is resorted to for the purpose of explaining it, and giving to the intention of the parties complete operation; and when the estate intended to be conveyed is sufficiently described in the deed, or other writing, the addition of a circumstance, false or mistaken, will be rejected as surplusage, in order to carry the intention into effect. But in these tax proceedings, the owner of the estate has nothing to do, — he intends nothing; the government is acting through its agents, in hostility to him, and with a view of enforcing the collection of a tax from him": Blackwell on Tax Titles, 152; *Tallman v. White*, 2 N. Y. 70; *Dike v. Lewis*, 4 Denio, 238.

8. The proof as to the payment of taxes was properly excluded. Title to another man's property cannot be acquired by the payment of the taxes thereon. And the payment of the taxes by the occupant, in the present case, for a portion of the time he was in possession, was not of itself, disconnected from other circumstances, evidence that the owner had abandoned the property.

The value of the improvements could not be set off against the damages claimed, as no foundation was laid in the allegations of the answer for any proof on the subject.

4. The charge to the jury on the subject of abandonment was correct. The charge was, that the question of abandonment was one of intention, of which the jury was to judge exclusively, and that in order to do so, they must take into consideration all the facts and circumstances before them. The question was correctly stated; it was plainly one of intention, to be gathered from the facts. There was little evidence on the subject, — none from which the court would have been warranted in taking it from the jury. There are cases, un-

doubtedly, in which an abandonment may be inferred from the lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises. But in such cases, the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession. In the case at bar, it appears that when Mondolet ceased to occupy in person the premises, he left an agent in charge of them. This circumstance is of itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question whether, in fact, he did or did not abandon them, one for the consideration of the jury.

There was no error in the charge of the court that the Van Ness ordinance had no operation in favor of the defendants. By that ordinance the city relinquished and granted all her title and claim to her lands, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the introduction of the ordinance in the common council; or if interrupted by an intruder or trespasser, had been or might be recovered by legal process. The defendant Dumartheray was in the actual possession of the premises in controversy at those periods, but it was a possession acquired by intrusion upon the prior rights of Mondolet. In determining the question whether or not there had been such intrusion, Dumartheray, and those claiming under him, could not invoke the protection of the ordinance.

5. Some doubt is thrown upon the evidence of the witness for the plaintiff, from the contradiction between his testimony and statements in the complaint filed by Mondolet against Dufan. Still the plaintiff's case would not be materially changed if we suppose the personal occupation of the premises by Mondolet ceased in September, 1850, and that the subsequent occupation until the fire in June, 1851, was by his agent. The question of the prior possession of Mondolet was distinctly left to the jury, and there is not sufficient in the doubts created as to the statements of the witness to justify any interference with their action. A verdict is not to be disturbed where the evidence is merely conflicting. The jury having the witnesses before them are the most competent judges of the weight to be attached to their testimony; and it is not sufficient that an appellate court, looking at the testi-

mony as it is written down, would have come to a different conclusion.

Judgment affirmed.

COPE and NORTON, JJ., concurred.

The appellants applied for a rehearing on the grounds:

1. That the court had not in its opinion passed upon the question whether the tax deed, under which Dumartheray entered, and which was found invalid, was or was not sufficient to constitute a color of title, and therefore a good defense to prior possession.

2. That as against the defendant Cannovan the judgment should be modified, so that no damages for the value of the use and occupation should be recoverable against him, as it appeared from the record that he was a tenant of Dumartheray, and paid rent to him.

FIELD, C. J., delivered the opinion of the court on the petition.

The possession of Mondolet was evidence of seisin in fee in him, and no further or higher evidence of title was required to enable the plaintiff, claiming through him, to recover, until the defendant had shown an anterior possession, or had traced title from a paramount source: *Day v. Alverson*, 9 Wend. 223; *Hill v. Draper*, 10 Barb. 458. It is immaterial in this view whether we consider the tax deed to Dumartheray sufficient to constitute color of title or otherwise.

The fact that Cannovan was a mere tenant of Dumartheray, and had paid rent for the premises, does not release him from liability to the plaintiff. The action of ejectment lies only against the occupant of the premises, and to him the plaintiff must look for compensation for their use. If Cannovan has already paid the rent, he can have recourse upon his landlord for any further sum he may be compelled to pay by the present action.

Rehearing denied.

COPE, J., concurred.

PRIOR POSSESSION AS EVIDENCE OF TITLE IN EJECTMENT: See *Bird v. Liebro*, 70 Am. Dec. 617, note 620, where other cases are collected. As a general rule, where a party enters in good faith upon land, with color of title, under a deed purporting to convey the land with specific boundaries,—no person being in the adverse possession at the time,—and he takes and holds actual possession of a part, *bona fide*, claiming title and possession of the whole tract described in the deed, he is to be deemed to have the possession

of the whole tract within the boundaries of the deed: *Kile v. Tubbs*, 23 Cal. 437, citing the principal case. Possession is evidence of seisin in fee in the party in possession, and no further or higher evidence of title is required to enable a party claiming under him to recover in ejectment, until the defendant shows an anterior possession, or traces title from a paramount source: *Hicks v. Coleman*, 25 Id. 141, citing the principal case. A deed is admissible in evidence to show the boundaries and extent of the possession taken under it, although there is no testimony that the grantor had title: Id. 139; *Wales v. Hill*, 38 Id. 488; *Mileap v. Stone*, 2 Col. 140, all citing the principal case. In ejectment, possession by one claiming to be the owner in fee is *prima facie* evidence of his ownership, and throws upon his adversary the burden of rebutting the presumption thus raised: Id. 139, also citing the principal case.

STRICT COMPLIANCE WITH ALL REQUIREMENTS OF STATUTE IS NECESSARY to validate a tax title: See *McGaken v. Carr*, 71 Am. Dec. 421, note 427, where other cases are collected.

RECOITALS IN TAX DEED AS EVIDENCE OF COMPLIANCE WITH STATUTE: See *Working v. Webster*, 71 Am. Dec. 543, note 547.

TAX DEED IS VOID FOR UNCERTAINTY WHERE DESCRIPTION IS SO INCOMPLETE as to require the aid of extrinsic evidence: *Wofford v. McKinna*, 76 Am. Dec. 53, note 57, where other cases are collected; *Garwood v. Hastings*, 38 Cal. 224, citing the principal case. The description in an assessment for taxes must be certain of itself, and not such as to require evidence *aliunde* to render it certain: *People v. Mahoney*, 55 Id. 288, also citing the principal case.

ADMISSIONS BY PARTY IN HIS PLEADINGS MAY BE USED AGAINST HIM in another action, if pertinent: *Warfield v. Lindell*, 77 Am. Dec. 614.

ABANDONMENT, WHAT NECESSARY TO CONSTITUTE, AND EVIDENCE OF: See *Eads v. Bracketton*, 79 Am. Dec. 88, note 102; *Wyman v. Hurlburt*, 40 Id. 461, note 464, where this subject is discussed. Abandonment is a question of intention to be determined by the jury: *Davis v. Perley*, 30 Cal. 636; *Moore v. Rollins*, 36 Id. 339, both citing the principal case.

VERDICT WILL NOT BE SET ASIDE AS BEING AGAINST EVIDENCE, unless the court can with confidence decide that it is unauthorized by the testimony: *Moss v. State*, 65 Am. Dec. 433, note 433, where other cases are collected; *Graham v. Reynolds*, Id. 745, note 746.

BLOCKLEY v. FOWLER.

[21 CALIFORNIA, 325.]

WHERE MORTGAGEE WHO SELLS UNDER POWER CONTAINED IN MORTGAGE, AND BECOMES HIMSELF PURCHASER indirectly by having the mortgaged premises bid in for himself, such sale is voidable only, but not void; the legal title passes thereby.

IN ACTION OF EJECTMENT, WHERE DEFENDANT CLAIMS TITLE THROUGH PURCHASE MADE AT SALE under a power contained in a mortgage, an instruction in these words is erroneous: "If the jury believe from the evidence that M. B. McKinney, the mortgagee mentioned in the mortgage made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale

for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser, but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, then the sale was void."

EJECTMENT. The opinion states the case.

Hall and Huggins, for the appellants.

E. L. Gould and D. W. Perley, for the respondents.

By Court, NORTON, J. This is an action to recover the possession of real estate. The plaintiffs and defendants both claim under A. M. Jackson, the latter under a mortgage sale, and the former under a deed. In 1850, May 15th, Jackson executed a mortgage to one McKinney, with a power to sell on default in payment of the mortgage debt. Acting under this power, McKinney sold the property on the second day of November, 1850, which was bid in by one Fairchild, who, on the same day, reconveyed the property to McKinney, and the latter, on the twelfth day of September, 1853, conveyed to the defendant Fowler, who took possession in 1854, and has since occupied. On the thirtieth day of December, 1859, Jackson made a deed of the premises to the plaintiff Blockley, and this action was commenced on the twenty-fourth day of February, 1860.

On the trial, upon the request of the plaintiffs, the court gave the following instruction to the jury: "If the jury believe from the evidence that M. B. McKinney, the mortgagee mentioned in the mortgage made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser, but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, that then the sale was void."

This charge was erroneous. A mortgagee who sells under a power contained in the mortgage, and becomes himself the purchaser indirectly by having the mortgaged premises bid in for himself, cannot hold it against the mortgagor, if the latter chooses to file his bill to set aside the sale or to redeem, provided this be done within a reasonable time after being apprised of the sale. But the sale is not void. It is only voidable. The legal title passes: *Jackson v. Van Dalfsen*, 5 Johns. 48; *Jackson v. Walsh*, 14 Id. 407; *Bergen v. Bennett*, 1

Caines Cas. 1 [2 Am. Dec. 281]; *Slee v. Manhattan Co.*, 1 Paige, 48; *Davous v. Fanning*, 2 Johns. Ch. 252; *Scott v. Free-land*, 7 Smedes & M. 409 [45 Am. Dec. 310].

It is also insisted that the sale was void, on the ground that the notice of sale required by the power was not given. Some of the above cited cases show that such an irregularity, if it occurred, might have been acquiesced in by the mortgagor, and if so, the sale would not be void. It is impossible for us to say how the jury might have found upon this point, or as to the fact of notice having been given, if the case had been properly submitted to them, because under the instruction given, as above stated, the jury, with the testimony of Fairchild as to his having purchased for McKinney unquestioned, could not have done otherwise than find for the plaintiff.

For this error the judgment must be reversed, and the cause remanded for a new trial. The costs of this appeal to abide the event.

FIELD, C. J., and COPE, J., concurred.

MORTGAGES WITH POWER TO SELL CANNOT PURCHASE at the sale made under the power: See *Imboden v. Hunter*, 79 Am. Dec. 116, note 122. But a sale irregularly made under a power in the mortgage must stand, if the mortgagor does not ask to have it set aside: *Benham v. Rowe*, 56 Id. 342.

DUTIL v. PACHECO.

[21 CALIFORNIA, 433.]

IF COURT OF LAW HAS FIRST ACQUIRED JURISDICTION AND DECIDED CASE, where courts of law and of equity have concurrent jurisdiction, a court of equity will not interfere to set aside the judgment, unless the party has been prevented by some fraud or accident from availing himself of the defense at law.

STATUTORY PROVISION MAKING JUDGMENT IN ACTION AGAINST SHERIFF CONCLUSIVE AGAINST HIS INDEMNIFIER, when the latter has been notified of the action, is founded on the principle that the action is, in substance, against the indemnifier, and that he has in that action an opportunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of such action, he cannot maintain a bill in equity to set aside the judgment obtained therein.

ACTION to set aside a judgment. The opinion states the case.

H. Allen, for the appellant.

M. S. Chase, for the respondents.

By Court, NORTON, J. This is an action in the nature of a bill in equity to set aside a judgment recovered by Pacheco against Hunsacker, who, as sheriff, seized and sold certain personal property of Pacheco under an execution in favor of Dutil against Andegue. Dutil claims the right to maintain this action, on the ground that he indemnified the sheriff against damages for taking said property.

It appears by the pleadings that when the action by Pacheco against Hunsacker was commenced, the latter gave Dutil notice of the action, and that Dutil took charge of the defense, and by his own attorneys defended the action from the commencement to the conclusion.

Under such circumstances, the judgment against the sheriff was conclusive evidence of his right to recover against Dutil on the bond of indemnity, by the provisions of section 645 of the civil practice act. By virtue of section 659, Dutil might have intervened, and defended as a party to the record, as he did as a party in interest in the name of the defendant on the record.

The alleged fraud in the sale of the property by Andegue to Pacheco, which is the basis of the present action, might have been litigated in that action, and would, if proved, have defeated the action.

Where courts of law and equity have concurrent jurisdiction, if a court of law has first acquired jurisdiction, and decided a case, a court of equity will not interfere to set aside the judgment, unless the party has been prevented, by some fraud or accident, from availing himself of the defense at law: *Truly v. Wanzer*, 5 How. 141; *Allen v. Hopson*, 1 Freem. (Miss.) 276; *Norton v. Woods*, 22 Wend. 524; *Smith v. McIver*, 9 Wheat. 532; *Haden v. Garden*, 7 Leigh, 157.

The provision of the civil practice act making the judgment conclusive evidence against the indemnifier, when he has been notified of the action, is founded upon the principle that, under such circumstances, the action is in substance against the indemnifier,—the real party in interest,—and that he has in that action an opportunity to make any defense that may exist.

Supposing, then, the facts alleged in regard to the action at law, and the notice to Dutil, and his participation in the defense, to have been satisfactorily established, and this must be presumed in support of the decree, nothing to the contrary

appearing in the record, we think the decree dismissing the action was proper.

Judgment affirmed.

FIELD, C. J., and COPE, J., concurred.

WHERE TWO COURTS POSSESS CONCURRENT JURISDICTION, that one in which jurisdiction of a case first attaches will retain it for final disposition: *Merrill v. Lake*, 47 Am. Dec. 377, note 331, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Sampson v. Olmeyer*, 22 Cal. 208, to the point that if a party to a suit has a right to resort to another upon his failure in the action on the ground that he is indemnified by such third party, it is clearly his duty to give full notice to the party who has agreed to indemnify him of the pendency of the suit, what it is he requires him to do in the suit, and the consequences which may follow if he neglect to defend the action. It is also cited in *Lyme v. Allen*, 51 N. H. 245, to the point that the fraud which would require the interposition of a court of equity must be such as to have deprived the injured party of the opportunity to avail himself of his rights in a court of law; and it must be an independent fraud, unmixed with any fault or negligence of the party seeking the relief.

WOODWARD v. LAZAR.

[21 CALIFORNIA, 448.]

NAME ESTABLISHED FOR HOTEL IS TRADE-MARK in which the proprietor has a valuable interest that a court of equity will protect against infringement.

TENANT, BY GIVING PARTICULAR NAME TO BUILDING AS SIGN OF BUSINESS done by him at that place, does not thereby make the name a fixture to the building, nor transfer it to the landlord upon the expiration of his lease.

WHERE IMITATION OF NAME OF HOTEL IS CALCULATED TO DECEIVE PUBLIC into the belief that it is the same name as the original, its use will be restrained by injunction, as where the name of the plaintiff's hotel is the "What Cheer House," and the defendant opens a hotel under the name of the "Original What Cheer House," the word "original" being painted on the sign in smaller letters than the residue of the title.

APPEAL from an order granting and an order refusing to dissolve an injunction. The opinion states the case.

Delos Lake, for the appellants.

S. Heydenfeldt, for the respondent.

By Court, NORTON, J. This is an appeal from an order granting and an order refusing to dissolve an injunction by which the defendants are restrained from using the name of "What Cheer House" as the title or name of a hotel in the city of San Francisco.

Woodward, being the lessee of a lot of land, erected upon it a building, which he occupied as a hotel, and to which he gave the name of the "What Cheer House." Before the expiration of his lease, he purchased an adjoining lot, upon which he erected a larger building, and for a time occupied both buildings as the What Cheer House, the principal sign being removed from the first and placed upon the second building. In November, 1860, he surrendered the leased premises, with the building he had erected on them, to the owners of the land, but continued to carry on the business of the What Cheer House in the building he had erected on the lot he had purchased. In January, 1861, the defendants purchased from the owners of the first-mentioned lot and building, and opened there a hotel, under the name of the "Original What Cheer House,"—the word "original" being painted on the sign in smaller letters than the residue of the title, and disposed in such manner that it was calculated to deceive the public into the supposition that it was the same name.

It has been decided, and with good reason, that the name established for a hotel is a trade-mark, in which the proprietor has a valuable interest, which a court of chancery will protect against infringement: *Howard v. Henriques*, 3 Sand. 725. The point of dispute in the case is as to whom the name "What Cheer House," as a business sign, belongs. The plaintiff claims that it belongs to him, as the keeper of the hotel, which he continued to conduct under that name after he surrendered the leased premises; while the defendants claim that it is the designation of the building in which the business under that name was first conducted, and became theirs when they became the owners of that building.

The character of the business which the name designates seems to determine that the name pertains to a building, or at least to a business conducted in a particular building, rather than to the calling of the person conducting the business. If a hotel-keeper creates a reputation for his business, it is as the keeper of some particular house at a known location. The "What Cheer House" cannot well be the business designation of a man separate from a house, though the converse may very well be. But conceding that the name of a hotel must pertain to some particular house, or be the trade-mark of the person as the keeper of a particular house, it does not follow that the name becomes inseparably connected with the building to which it was first applied. The name is not a "fixture."

A person may have a right, interest, or property in a particular name which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building, and transfer it irrevocably to the landlord. In this case, it does not appear that the lessee was under obligation to establish any particular business on the demised premises. Doubtless, he might at any time have discontinued the business of a hotel-keeper, and established in its stead the business of a merchant, and for this purpose have discarded the business name he had used for his hotel. And if he could do that, it seems to follow that he might remove from the demised premises, and establish a hotel at another place, and give to it the name he had used at the first locality. This, in effect, is what the plaintiff did. Before surrendering the demised premises, he transferred his business, and the name under which it was conducted, to another building, and then surrendered the demised premises and the building, with no special name, to his landlords. He had conducted the business under the name of the "What Cheer House," at his new locality, at least from November until January, while the old building remained unoccupied, and before it was opened as a hotel. He had in this time, if he had no other claim, established an exclusive right to the name as the trade-mark for his new house. Although, therefore, his claim to protection, so far as his right results from the good-will acquired for the name while it was applied exclusively to the demised premises may not be sustainable, he is entitled to protection in the exclusive use of the name as proprietor of the new house.

Order affirmed.

COPE, J., concurred.

TRADE-MARK, REMEDY FOR IMITATION OF: See *Bartons v. Knight*, 78 Am. Dec. 452, note 454, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Shawer v. Shawer*, 54 Iowa, 211, to the point that if the imitation of a trade-mark is calculated to deceive, and may be taken for the original, its use will be restrained; also in *Gilman v. Hunnewell*, 122 Mass. 151, to the point that a fancy name for a hotel may be the subject of a trade-mark.

McCARTHY v. WHITE.

[21 CALIFORNIA, 435.]

WHERE ACTION ON PROMISSORY NOTE, SECURED BY MORTGAGE OF SAME DATE, IS BARRED by the statute of limitations, the remedy upon the mortgage is also barred.

STATUTE OF LIMITATIONS IS STATUTE OF REPOSE, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. The view that the statute proceeds upon a presumption of payment, and that the effect of an acknowledgment is to rebut this presumption, and place the debt upon its original footing, is now exploded.

STATUTE OF LIMITATIONS AFFORDS PROTECTION TO EACH OF TWO OR MORE PERSONS JOINTLY BOUND, and an acknowledgment by one is not available against another, unless he had authority to make it either expressly given or resulting from the relation of the parties; and this principle is applicable in cases where an attempt is made to enforce a security.

SUBSEQUENT PURCHASER OF MORTGAGED PREMISES MAY AVAIL HIMSELF OF STATUTE OF LIMITATIONS as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured. And such purchaser is not affected by an acknowledgment of the debt made by the mortgagor after the debt was barred, nor by an extension of the time of payment then made; and the fact that the mortgagee, when he received such acknowledgment and extended the time of payment, did not know of the purchase, is immaterial, where the period of limitation had already expired, and no consideration was given for the acknowledgment.

FRAUD IS NEVER PRESUMED; and where it is alleged, the facts sustaining it must be clearly made out. Where, therefore, it is simply shown that a person acted as agent in procuring a note and mortgage, and in receiving interest upon the note, the court will not infer from this that his duties as agent were of such a character as to prevent him from contracting in relation to the property on which the debt was secured.

ACTION to foreclose a mortgage. The opinion states the case.

W. W. Stow, for the appellants.

G. F. and W. H. Sharp, for the respondent.

By Court, COPE, J. This is an action to foreclose a mortgage executed by the defendant White, upon certain real estate in the county of Santa Cruz. There are several defendants, and among them is one Eugene Kelley, who claims the premises under a conveyance from White, and relies upon the statute of limitations as a bar to the foreclosure. The mortgage debt became due on the 4th of March, 1854, and on the 10th of May, 1858, a portion of the debt having been paid, the parties had an accounting, and upon ascertaining the balance due, executed a writing by which it was agreed that payment of such

balance should not be enforced until the 1st of January, 1859. The premises were conveyed to Kelley on the 8th of April, 1859, and the conveyance was taken by him with notice of the previous transactions between White and the plaintiff; an agreement to convey, however, having been entered into on the 3d of April, 1856. The court finds that this agreement was not recorded, and that the plaintiff had no notice of it; that he left the state in 1853, and was absent until the spring of 1858; and that Kelley acted as his agent in taking the mortgage, and in the management of his business during his absence. The action was commenced on the 28th of October, 1859.

The case of *Lord v. Morris*, 18 Cal. 482, settles the question of the application of the statute, and the only inquiry is, whether the writing of May, 1858, takes the case out of its operation. There is no doubt that it does so, as against White, but Kelley contends that it is ineffectual as against him, he being the equitable owner of the property under the agreement of 1856. The property is an undivided interest in a part of a tract of land which belonged originally to White and Kelley jointly, and the object of the agreement was to provide for a partition of the land. It set forth the terms of the partition, and stipulated for an exchange of deeds, fixing no time, however, at which the exchange should be made, but stating, generally, that it should be made as soon as it could be legally done. The interest covered by the mortgage was to be deeded to Kelley, and the effect of the agreement was to vest in him a right to a deed upon the performance of the consideration on his part. This right constituted an interest in the property adverse to the mortgage, and when the statute had run, and a right of action upon the mortgage no longer existed, it was not in the power of another to create one as against him. The most that can be claimed for the writing is, that it was an acknowledgment of the debt, and treating it as such, no effect can be given to it except as between the parties. We say this, of course, upon the assumption that Kelley is under no disability in regard to the agreement, and for the present we shall consider the case without reference to the objections taken in that respect. For the purposes of the case, we shall assume that the acknowledgment, so far as it is operative at all, takes the case out of the statute in respect to the mortgage as well as the debt. It was formerly held that statutes of this nature proceeded upon a presumption of payment, and that the effect of an acknowledgment was to rebut this presumption, and

place the debt upon its original footing. This view is now exploded, and the statute is universally regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. If two or more persons are bound, the same protection is afforded to each, and an acknowledgment by one is not available against another, unless he had authority to make it, either expressly given, or resulting from the relation of the parties. The effect of the statute in this respect is perfectly well settled, and it is immaterial, of course, whether the original liability was personal and direct, or resulted incidentally from a charge upon property. In cases of personal liability, the doctrine as we have stated it is conclusively established, and the principle is equally applicable in a case of this character, where an attempt is made to enforce a security. It is clear, therefore, that the plaintiff cannot avail himself of the acknowledgment as against Kelley, unless the circumstances of the case are such as to preclude Kelley from relying upon the agreement. It appears that the plaintiff was ignorant of its existence, but as he parted with nothing in consideration of the acknowledgment, he is not in a position to complain on that ground. It is not enough that he acted in good faith, and without notice. The acknowledgment cost him nothing, and his rights under it are not those of an encumbrancer for value. If the debt had not been barred, the position of the plaintiff would be different; having no notice of the agreement, if he had suffered the statute to run, relying upon the acknowledgment, he would be entitled to protection. As the debt was barred, however, he cannot claim that his rights have been prejudiced by the want of notice, for the acknowledgment gave him none which could possibly be affected by it.

The question in regard to the agency is a more difficult one; but looking solely to the findings, we cannot see that Kelley is under any disability on that account. Until the mortgage was barred, the agreement had no effect upon it; and so far as appears, there was no conflict between the duties of Kelley as agent and his interest as a party to the agreement. An agent is not allowed to place himself in antagonism to his principal in the business of his agency, and as against the principal, he can derive no benefit from contracts made by him in violation of this rule. It must appear, however, that the rule has been violated, and we are not to indulge presumptions upon the subject for the purpose of depriving a

party of the fruits of his engagements. The court finds in regard to the agency nothing but the fact of its existence, and the receipt of interest upon the mortgage debt, the particular duties devolving upon Kelley as agent not being stated. We cannot infer that these duties were of a character which prevented him from contracting in relation to the property upon which the debt was secured; the presumption is that they were not. It is never to be presumed that a party has committed a fraud, and where fraud is alleged for the purpose of depriving him of a right, the facts sustaining it must be clearly made out. The charge here is, that the agreement was a fraud upon the plaintiff, and an act of bad faith on the part of Kelley, but the facts found do not show it to have been so.

The point made in regard to the absence of Kelley from the state is not properly before us, as there is nothing in the findings upon the subject.

The judgment is reversed, and the cause remanded for a new trial.

FIELD, C. J., concurred.

NORTON, J. I concur in the decision of this case upon the ground that both the questions upon which there could be any argument, upon principle, have been decided by this court in the case of *Lord v. Morris*, 18 Cal. 482, and that these are questions of that character that once deliberately decided, and after having stood for several years as rules to govern transactions, they should not be opened merely to consider again the weight of conflicting decisions and opposing reasons.

WHERE DEBT SECURED BY MORTGAGE IS BARRED by the statute of limitations, the creditor has no remedy left on the mortgage: *Perkins v. Sterne*, 76 Am. Dec. 72, note 76, where other cases are collected; *Wills v. Farley*, 24 Cal. 498; *Low v. Allen*, 26 Id. 144, both citing the principal case. And the debtor may avail himself of the statute as effectually as in a case where the debt was not secured by mortgage: *Cunningham v. Hawkins*, 24 Id. 409, citing the principal case.

ACKNOWLEDGMENT BY ONE JOINT AND SEVERAL PROMISOR will not revive against his co-promisors a debt barred by the statute of limitations: See *Van Keuren v. Parmelee*, 51 Am. Dec. 322, note 331, where this subject is considered. An acknowledgment of a debt must be contained in some writing signed by the party to be charged thereby, to take the case out of the statute: *Heinlin v. Castro*, 22 Cal. 102, citing the principal case.

SUBSEQUENT PURCHASER FROM MORTGAGOR MAY AVAIL HIMSELF OF STATUTE of limitations as a defense to an action to foreclose the mortgage: *Grattan v. Wiggins*, 23 Cal. 25; *Coster v. Brunen*, Id. 143; *Lent v. Shear*, 26 Id. 366;

Wood v. Goodfellow, 43 Cal. 188; *Jeffers v. Cook*, 58 Id. 151, all citing the principal case.

FRAUD MUST BE CLEARLY PROVED: See *Bryan v. Ramirez*, 68 Am. Dec. 240, note 245, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Grattan v. Wiggins*, 23 Cal. 34, to the point that the California statute of limitations applies to suits in equity as well as to actions at law.

PEOPLE v. HARTLEY.

[21 CALIFORNIA, 565.]

OFFICIAL BOND IN WHICH ONE PERSON, AS PRINCIPAL, AND SEVERAL OTHERS, AS SURETIES, are bound unto the people in the respective sums affixed to their names, a different sum being set opposite the name of each surety, for the payment of which they severally bind themselves, their heirs, etc., is an instrument embracing several distinct obligations by which the principal and each of the sureties bind themselves in the sums designated, not jointly and severally, but only jointly. The term "severally," as used in the instrument, applies only to the different sums which the parties, respectively, specify as the limit of the liability they assume.

SIGNATURE OF PRINCIPAL IS ESSENTIAL TO VALIDITY OF BOND which is the joint, and not the joint and several, bond of him and his sureties, and without his signature it has no binding force upon his sureties.

ABSENCE OF SIGNATURE OF PRINCIPAL TO OFFICIAL BOND IS NOT SUCH DEFECT AS CAN BE CURED, upon its suggestion in a complaint, under section 11 of the California act concerning official bonds.

ACTION against the defendant, one of the sureties on the official bond of W. N. Brooks, former treasurer of Yolo County. The complaint set forth the bond, and charged that Brooks, as treasurer, was a defaulter in the sum of seven thousand dollars, for which the defendant was liable as surety. It also suggested several "defects" in the bond, and among them the failure of Brooks to sign it, with a view to obviate their effect under the provisions of section 11 of the act of February 9, 1850. The bond recited that William N. Brooks, as principal, and H. H. Hartley, William Green, O. V. Chapman, M. Bryte, W. G. Hunt, as sureties, were held and firmly bound unto the people of the state of California in the several sums as thereafter specified and affixed to their names, viz.: Henry H. Hartley in the penal sum of ten thousand dollars; William Green in the penal sum of five thousand dollars; O. V. Chapman in the penal sum of three thousand dollars; J. V. Hoag in the penal sum of three thousand dollars; W. G. Hunt in the penal sum of five thousand dollars; William Gordon in the penal sum of five thousand dollars, for the which pay-

ment, well and truly to be made, they severally bound themselves, their heirs, executors, administrators, and assigns. The bond was signed by Hartley, Green, Chapman, Hoag, Bryte, Hunt, and Gordon, but was not signed by Brooks. The justification of the sureties, and the approval of the county judge, were indorsed on the bond. Section 11 of the act of February 9, 1850, is as follows: "Whenever any such official bond shall not contain the substantial matter or condition or conditions required by law, or there shall be any defects in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be equitably bound to the state or party interested, and the state or such party may, by action instituted as other suits on official bonds, in any court of competent jurisdiction, suggest the defect of such bond or such approval or filing, and recover his proper and equitable demand or damages from such officer and the person or persons who intended to become and were included as sureties in such bond." The defendant demurred to the complaint, and the demurrer was overruled; and no answer being made, plaintiff had judgment for the amount claimed, from which the defendant appealed.

H. O. Beatty and J. B. Harmon, for the appellant.

E. B. Crocker, for the respondent.

By Court, FIELD, C. J. The bond executed by Hartley and others embraces several distinct obligations. The principal and each of the sureties bind themselves in certain sums designated; and, as we read the instrument, not jointly and severally, but only jointly. The term "severally," as used in the instrument, applies only to the different sums which the parties respectively specify as the limit of the liability they assume. Being a joint bond, the signature of the principal was essential to its validity and binding force upon the sureties. As we said of the bond in the case of *City of Sacramento v. Dunlap*, 14 Cal. 423, so we may say of this: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. . . . Some one must have written his signature first; but it is to be presumed, upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete, and without binding obligation upon either";

See *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21; *Fletcher v. Austin*, 11 Vt. 447 [34 Am. Dec. 698]; *Johnson v. Erskine*, 9 Tex. 1.

The defects in official bonds, which may be cured upon their suggestion in a complaint, do not embrace the absence of the signature of the principal obligor. Without his signature, the instrument is not his deed. There is no bond of his in which defects can be suggested and cured.

These considerations dispose of the case, and render it unnecessary to notice any of the other points discussed by counsel.

The judgment must be reversed, and the court below directed to enter judgment for the defendant upon the demurrer to the complaint; and it is so ordered.

COPE and NORTON, JJ., concurred.

OFFICIAL BONDS, WHEN VALID AND WHEN VOID. — Official bonds will not be declared invalid by the courts, except upon the most cogent and satisfactory grounds. Of course, if a statute which prescribes the conditions and terms of such bonds, declares that all bonds not taken pursuant to it shall be void, they will be held void; but unless the statute expressly so provides, only those parts or conditions of the bond that are contrary to the provisions of the statute will be void. All the rest of the conditions will be held good, and the obligors will not be allowed to escape liability because the bond does not conform in all things with the requirements of the statute: *Murfree on Official Bonds*, sec. 38; *Justices v. Wynn*, Dud. (Ga.) 22; *Stephens v. Crawford*, 1 Ga. 574; S. C., 44 Am. Dec. 680; *Commonwealth v. Lamb*, 1 Watts & S. 261. An official bond, which complies substantially with the statutory requirements, is sufficient: *Boring v. Williams*, 17 Ala. 530; *People v. Slocum*, 1 Idaho, 62; *Quimby v. Adams*, 11 Me. 332; *Boykin v. State*, 50 Miss. 375; *Winslow v. Commonwealth*, 2 Hen. & M. 459. In Mississippi, the law provides that the statutes prescribing the forms of official bonds shall be held to be directory only: *Murfree on Official Bonds*, sec. 41; *Boykin v. State*, 50 Miss. 375. If the amount of the penalty of an official bond exceeds that required by the statute, the bond will be valid to the amount prescribed by the statute, and void only as to the excess: *Murfree on Official Bonds*, sec. 38; *Mathews v. Lee*, 25 Miss. 417; *State v. Rhoades*, 6 Nev. 352; *Commonwealth v. Lamb*, 1 Watts & S. 261; *McCaraher v. Commonwealth*, 5 Id. 21; S. C., 39 Am. Dec. 106. It is no valid objection to an official bond that it is broader in its terms than was required, so long as no additional obligations are incurred: *Supervisors of Schoharie Co. v. Pindar*, 3 Lana. 8. And an official bond for sixty-five thousand dollars is a sufficient compliance with an order requiring one for sixty thousand dollars: *In re Read*, 34 Ark. 239. When an official bond imposes greater obligations than the statute requires, the conditions not required may be rejected as illegal, and those required by the statute enforced, unless such a construction is forbidden by the statute, or a contrary intention on the part of the obligors is shown: *Philadelphia v. Shallecross*, 14 Phila. 125; *Polk v. Plummer*, 2 Humph. 500; S. C., 37 Am. Dec. 566.

Where new duties are by statute imposed upon an officer, after he has exa-

cutted his official bond, this fact will not render it void as an undertaking for the faithful performance of the duties which he at first assumed. It will remain a binding obligation for what it was originally given to secure, although it may not devolve upon the obligors responsibility for the manner in which the officer may perform such new duties: *Murfree on Official Bonds*, sec. 652; *Commonwealth v. Holmes*, 25 Gratt. 771; *Gausson v. United States*, 97 U. S. 584.

The fact that changes are made in the duties of the officer, after the execution of his bond, by relieving him of the custody of certain funds, or that his salary has been reduced, does not impair the validity of the bond: *Sacramento Co. v. Bird*, 31 Cal. 67.

The validity of an official bond cannot be impeached by the officer, or his sureties, on the ground that it does not conform to the statute, where it appears that the bond was more favorable to the obligors than that required by the statute. Although the condition may not be as extensive as the statute authorizes, yet so far as an obligation is created, it is good. And an omission in it which renders it insensible may be supplied by reference to the whole bond whereby the intention of the parties can be ascertained: *Kincannon v. Carroll*, 9 Yerg. 11; S. C., 30 Am. Dec. 391. And an official bond cannot be objected to merely because its conditions are less onerous than those required by law: *White v. Miller*, 3 Dev. & B. 55.

BOND EXECUTED BY PUBLIC OFFICER MAY BE GOOD AS VOLUNTARY OBLIGATION, although it may, for various reasons, not be a valid statutory bond: *Stephens v. Crawford*, 1 Ga. 574; S. C., 44 Am. Dec. 680; *People v. Shannon*, 10 Ill. App. 364; *State v. Fredericks*, 8 Iowa, 553; *State v. Heisey*, 56 Id. 404; *Board of Supervisors v. Coffenbury*, 1 Mich. 355; *State v. McAlpin*, 4 Ired. 140; *Claassen v. Shaw*, 5 Watts, 468; S. C., 30 Am. Dec. 338; *Goodrum v. Carroll*, 2 Humph. 490; S. C., 37 Am. Dec. 564; *United States v. Maurice*, 2 Brook. 96; *Murfree on Official Bonds*, sec. 67. Thus an official bond, though not taken in the manner or by the persons appointed by law to take it, will be valid as a voluntary bond: *State v. McAlpin*, *supra*. And an official bond given by an officer whose appointment was irregular, but whose office is established by law, though void as a statutory bond, is valid as a contract to perform the duties of the office, and is binding on his sureties: *United States v. Maurice*, *supra*. So a bond given by a sheriff after the time prescribed by the statute for the taking of his bond, may nevertheless be valid as a voluntary bond: *Stephens v. Crawford*, *supra*.

But where an officer is required by his superior, *colore officii*, to give a bond with stipulations or provisions not required by the statute, the bond is void *in toto*: *Murfree on Official Bonds*, sec. 39; *United States v. Humason*, 6 Saw. 199; *United States v. Tingey*, 5 Pet. 115; *United States v. Bradley*, 10 Id. 343; *State v. Heisey*, 56 Iowa, 404. In *State v. Shirley*, 1 Ired. 597, it was held that a constable's bond made payable to the state of North Carolina, taken by a person not authorized by law to take it, was void for want of delivery. In *Board of Supervisors v. Coffenbury*, 1 Mich. 355, it was, however, held that a bond given by the treasurer of a county, conditioned for the faithful performance of his official duties, to the board of supervisors of the same county, was a good and valid bond, although there was no statute requiring such bond to be given. In reference to that bond, Mundy, J., delivering the opinion of the court, said: "It was a voluntary bond given to the proper guardians of the interests of the county, to secure the faithful discharge of official duties by the financial officer of the county; and upon principles of public policy, as well as by adjudged cases, it is a valid obligation."

DEFECTS IN OFFICIAL BONDS, EFFECT OF. — For a consideration of the informalities which do not invalidate official bonds, see the note to *Whitchurst v. Hickey*, 15 Am. Dec. 170-172, where this subject is discussed at some length. The courts of all the states have been very liberal in sustaining the validity of official bonds, notwithstanding defects, omissions, or mistakes, in their execution, or in the conditions or recitals contained in them. In California, an official bond is not invalidated by the omission of even substantial matters: *Tevis v. Randall*, 6 Cal. 632; S. C., 65 Am. Dec. 547; *Hubert v. Mendheim*, 64 Cal. 213. The statute of that state provides that "whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and his sureties": Pol. Code, sec. 263. McKinstry, J., in delivering the opinion of the court in *Hubert v. Mendheim*, *supra*, after quoting the above statute, said: "Of course the words last quoted do not authorize the courts to change a writing entirely irrelevant into an official bond. The writing . . . must be a bond given by an officer or his deputy to secure the discharge of his duties. But being such, it is an official bond. . . . The bond, although it 'does not contain the substantial matter or conditions required by law,' is, nevertheless, an official bond." In Georgia, an official bond, though not conditioned as the statute prescribes, will, under section 167 of the code, be considered as if executed in conformity with the statute: *Smith v. Taylor*, 56 Ga. 292. Section 167 of the code is in the following words: "Whenever any officer, required by law to give an official bond, acts under a bond which is not in the penalty payable and conditioned, nor approved and filed as prescribed by law, such bond is not void, but stands in the place of the official bond, subject, on its condition being broken, to all the remedies, including the several recoveries which the persons aggrieved might have maintained on the official bond." Under the Indiana statute, an official bond, however informal or imperfect it may be in its terms, imposes the same obligation upon its makers as if every stipulation which the law requires were written within its body: *Yeakle v. Winters*, 60 Ind. 554. Judge Biddle, who delivered the opinion in that case, said: "The public law makes this class of bonds, and not the private agreement of the parties."

An official bond is not invalid because its conditions are more specific than the statute prescribes: *Boring v. Williams*, 17 Ala. 510. The official bond of a county treasurer is not void because it does not recite that the principal obligor is county treasurer, or that he was elected as such: *Wilson v. Cantrell*, 19 Id. 642. The failure of the principal obligor to place a seal opposite his name in an official bond does not invalidate the bond: *Supervisors of Sacramento Co. v. Bird*, 31 Cal. 66. An official bond is not vitiated because the sureties swear that "they are worth the amount for which they become liable, over and above all their just debts and liabilities," instead of saying "over and above all their debts," etc.: *Dorsey v. Smyth*, 28 Id. 21. The official bond of a county treasurer is not invalid because approved by the county judge instead of by the board of supervisors: *Mendocino Co. v. Morris*, 32 Id. 145. An official bond to "the people of the state of California," where the law requires it to be to "the state of California," is good: *Tevis v. Randall*, 6 Id. 632; S. C., 65 Am. Dec. 547. A constable's bond is not void merely because the penalty was not fixed by the board doing the county business, as the statute requires: *State v. Lynch*, 6 Blackf. 395. A failure to insert the names of the sureties in an official bond does not render the instrument invalid: *Stewart v. Carter*, 4 Neb. 564. A collector's bond is good, although it has no witnesses, or is

dated on Sunday, if it appears to have been delivered on Saturday: *Pierce v. Richardson*, 37 N. H. 306. In this case, Bell, J., delivering the opinion of the court, said: "A bond is not rendered ineffectual by any mistake which leaves its object and purpose free from doubt."

An official bond, which reads in the penalty that the obligors "are held and firmly bound unto A. Jackson Hyatt, town clerk," etc., is a valid bond to the town clerk, and not to Hyatt individually: *Sutherland v. Carr*, 85 N. Y. 105.

Where the statute requires the approval of an official bond by the judges of the court of quarter sessions, the bond will be good, although the persons designated in the statute style themselves judges of the court of common pleas: *Commonwealth v. Laub*, 1 Watts & S. 261. A county treasurer's bond, which is made payable to the individual occupying the position of county judge, is valid, notwithstanding its failure to designate his official character: *Smith v. Wingate*, 61 Tex. 54. A misrecital in a collector's bond, of the amount which he has to collect, does not make the bond void: *Justices v. Bartlett*, 5 B. Mon. 195. Nor will a mistake in the name of the obligee have that effect: *Charles v. Hashine*, 11 Iowa, 329; S. C., 77 Am. Dec. 148; *Parsley v. Hayes*, 22 Iowa, 11.

BLANKS IN BOND LEFT UNFILLED will not invalidate the bond, if the intent of the parties can be gathered from the whole of the instrument: *Murfree on Official Bonds*, sec. 42. Where a bond recites, "We, —, are held and firmly bound," etc., and is signed by a party whose name nowhere appears in the body of the bond, it is sufficient to bind him: *Moore v. McKinley*, 60 Iowa, 367. Where the name of the township for which a constable was elected is left blank in his bond, this will not make it invalid: *State v. Kirby*, 9 Mo. 295. And the omission of even a necessary word in the condition of an official bond, if it be clearly understood from the context, will not vitiate the bond: *County of De Soto v. Dickson*, 24 Miss. 150.

When an official bond is signed by the officer and his sureties, and delivered to the proper officer, an implied authority is given to fill up the names of the obligors. And the blanks may be filled, even at the trial: *Murfree on Official Bonds*, sec. 42; *Bartlett v. Board of Education*, 59 Ill. 364; *Smith v. Supervisors*, Id. 412; *City of Chicago v. Gage*, 95 Id. 593; *Stern v. People*, 102 Id. 540; *State v. Peck*, 53 Mo. 284; *Smith v. Crooker*, 5 Mass. 538; *Hults v. Commonwealth*, 3 Grant Cas. 61; *Rader v. Johnson*, 5 Lea, 538. But see *People v. Organ*, 27 Ill. 27; S. C., 79 Am. Dec. 391; *United States v. Nelson*, 2 Brock. 64. But if a bond is so written that it appears that several were expected to sign it, the obligee will be held to take it with notice that the obligors who do sign it can set up in defense that it was not executed by such others, if they agreed to become bound only on condition that the other co-sureties should join in the execution: *Murfree on Official Bonds*, sec. 43; *Pepper v. State*, 22 Ind. 399; *State v. Peck*, 53 Mo. 284; *Dair v. United States*, 16 Wall. 1.

In *Chamberlain v. Brewer*, 3 Bush, 562, the defendants pleaded *non est factum* to an action on the official bond of the sheriff, alleging that "when they signed the sheriff's bond, the name of D. V. Brewer was to it as a security; that they signed and acknowledged it in presence of the county court, which, together with W. J. Brewer, the principal represented that said D. V. Brewer had signed the bond, whereas he had not signed it." The circuit court sustained a demurrer to this plea, but the court of appeals held that the answer did present a good defense of *non est factum* by the sureties, and that the demurrer to their answer should have been overruled. And in *Fletcher v. Austin*, 11 Vt. 447, S. C., 34 Am. Dec. 698, it was decided that where an

official bond contains names of several sureties, if a part of them sign with an understanding and on the condition that it is not to be delivered to the obligee until signed by the others, it will not be effectual as to those who do sign until the condition is complied with; nor will they be made liable by the others signing it a long time after default in the performance of the condition of the bond, unless they then consent to the signing and delivery thereof. See also the note to that case where other cases are collected.

Where the principal in an official bond neither signs nor seals it (his name appearing in the body of it), his sureties who do sign it will be bound: *State v. Bowman*, 10 Ohio, 445.

FAILURE OF COURT, BOARD, OR OFFICER WHOSE DUTY IT IS TO APPROVE or file an official bond to perform that duty, will not affect the validity of the bond: *Murfrees on Official Bonds*, secs. 48, 49; *Auditor v. Woodruff*, 2 Ark. 73; S. C., 33 Am. Dec. 368; *Davis v. Haydon*, 3 Seam. 35; *Ashburn v. Lake*, 12 Ill. App. 25; *State v. Fredericks*, 8 Iowa, 553; *Boone Co. v. Jones*, 54 Id. 699; *McCracken v. Todd*, 1 Kan. 148; *Whitehurst v. Hickey*, 3 Martin, N. S., 589; S. C., 15 Am. Dec. 167; *State v. Hampton*, 14 La. Ann. 725; *Young v. State*, 7 Gill & J. 253; *Marshall v. Hamilton*, 41 Miss. 229; *Jones v. State*, 7 Mo. 81; S. C., 37 Am. Dec. 180; *Moore v. State*, 9 Mo. 330; *Dutton v. Kelsey*, 2 Wend. 615. In *Hart v. United States*, 95 U. S. 316, it was said that the government is not responsible for the laches, or the wrongful acts of its officers, and every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The alteration of an official bond by an officer who is by law the mere custodian of it, will not destroy the validity of the bond: *State v. Berg*, 50 Ind. 496.

OFFICIAL BOND OF DE FACTO OFFICER.—The bond given by a person who is merely a *de facto* officer, but who is discharging the duties of the office, is a valid obligation, and is binding upon the parties to it: *Williamson v. Woolf*, 37 Ala. 298; *People v. Slocum*, 1 Idaho, 62; *Jones v. Scanland*, 6 Humph. 195; S. C., 44 Am. Dec. 300.

OFFICIAL BOND OF DEPUTY.—Every bond demanded of and taken from a deputy for the faithful discharge of his duties is an official bond, and is subject to the same rules as other official bonds: *Hubert v. Mendheim*, 64 Cal. 213; *Mott v. Robbins*, 1 Hill, 21; S. C., 37 Am. Dec. 286. In *Gradle v. Hoffman*, 105 Ill. 147, the condition of the bond sued on was as follows: "Whereas, the above-bounden Benjamin H. Seligman has, by the said John Hoffman, sheriff, been duly appointed deputy sheriff of Cook County; now, if the said Benjamin H. Seligman shall well and faithfully perform all the duties of the said office as deputy sheriff that are or may be required of him by law, then this obligation to be void, otherwise the same shall remain in force and effect." Walker, J., delivering the opinion of the court, said: "It is insisted that the bond sued upon is void, and no recovery can be had on it. The statute authorizes the sheriff to take from his deputy a bond, as security for his indemnity. The statute prescribes no form for the condition of such a bond; and in the absence of such a provision, mere technicalities should not render it void. Unless the condition is contrary to public policy, or in contravention of the law, such bonds should be upheld and enforced. The condition of this bond is neither, and we are unable, for any reason, to say it is inoperative. The conditions are sufficiently explicit and free from doubt, and were agreed to by appellants when they signed the bond." And it was further held to make no difference whether the deputyship was an office or a mere place.

DUTTON v. WARSCHAUER.

[21 CALIFORNIA, 602.]

EJECTMENT MUST BE BROUGHT AGAINST ACTUAL OCCUPANT OF PREMISES, if there be one, and if the occupant be a tenant of another, the landlord may appear and defend in his name, or be substituted in his place.

APPEARANCE OR SUBSTITUTION OF LANDLORD IN ACTION OF EJECTMENT should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant cannot, to the prejudice of the landlord, interfere with any of the subsequent proceedings.

RIGHT OF LANDLORD TO CONDUCT PROCEEDINGS IN EJECTMENT, after having been once allowed to appear in the tenant's name, extends to the final disposition of the case, and is not limited to the proceedings in the lower court.

WHERE LANDLORD, AT REQUEST OF TENANT, APPEARS IN ACTION OF EJECTMENT, without any order of record, and conducts the defense to judgment in the lower court, it will be too late to object in the appellate court for the want of such order.

MORTGAGE IS, IN CALIFORNIA, MERE SECURITY OPERATING UPON PROPERTY AS LIEN or an encumbrance only, and is not regarded as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. This doctrine was established, not merely from a consideration of the provisions of the statute of 1851, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind. But the provisions of that statute led the court to carry the equitable doctrine as to mortgages to its legitimate and logical result, by regarding the mortgage as a security under all circumstances, both at law and in equity.

CHARACTER OF MORTGAGE AS MERE SECURITY IS NOT CHANGED BY DEFAULT in the payment of the debt secured, and payment after default will operate equally as an extinguishment of the lien with payment at the maturity of the debt.

POSSESSION OF MORTGAGEE UNDER MORTGAGE DOES NOT ENLARGE HIS INTEREST, nor in any way affect it.

MORTGAGEE AFTER CONDITION BROKEN CANNOT CONVEY LEGAL TITLE, whether he is in or out of possession, and his deed as mortgagee alone, without a transfer of the debt, passes nothing.

POSSESSION TAKEN BY MORTGAGEE BY CONSENT OF MORTGAGOR, after condition broken, will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured; and unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt.

TEMPORARY POSSESSORY RIGHT OF MORTGAGEE IN POSSESSION AFTER CONDITION BROKEN MAY BE TRANSFERRED, and the transferee will be substituted to the same rights and liabilities.

POWER TO SELL AND CONVEY LAND NOT UNDER SEAL, though insufficient to authorize the execution of a conveyance of the fee, is nevertheless sufficient authority for the execution of a contract of sale; and an instrument made by the donee reciting the sale is a sufficient "note or memorandum" of such contract, and though inoperative as a conveyance, is good as an agreement to convey.

PURCHASER UNDER CONTRACT INOPERATIVE AS CONVEYANCE BUT GOOD AS AGREEMENT to convey, who has paid the purchase-money, and entered into possession of the premises, will be protected by a court of equity against subsequent purchasers with notice.

POSSESSION OF REAL ESTATE BY TENANT IS SUFFICIENT NOTICE to put a purchaser upon inquiry as to the title of the landlord.

EJECTMENT. The opinion states the case.

O. L. Shafter and S. Heydenfeldt, for the appellant.

J. D. Bristol, for the respondent.

By Court, **FIELD, C. J.** The action of ejectment must be brought against the actual occupant of the premises, if there be one: *Garner v. Marshall*, 9 Cal. 268. If such occupant be a tenant of another, the landlord may appear and defend in his name, or be substituted in his place. But such appearance or substitution should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord. In the present case, the defense was made by the landlord at the request of the tenant. Judgment having passed against the tenant, the landlord took an appeal in his name. Thereupon the tenant executed a release of errors, and upon it the plaintiff moves for a dismissal of the appeal.

This motion must be denied. The right of the landlord to conduct the proceedings, after having been once allowed to appear and defend in the tenant's name, extends to the final disposition of the case, and is not limited to the proceedings in the lower court: *Kellogg v. Forsyth*, 24 How. 186. It is true, no order was entered allowing the landlord to appear and defend, but as the defense was in fact conducted by him to judgment at the request of the tenant, it is too late to object in this court for the want of such order; if it were otherwise, we would allow the order to be entered *nunc pro tunc*.

The plaintiff and the landlord of the defendant both deraign their title from a common source,—from Finley, Johnson, and Austin. These parties owned the premises in fee on the 13th of April, 1850. On that day they executed a mortgage thereon to one Meacham, to secure their bond to him for twelve thousand dollars, payable on the 12th of June following. The mortgagors made default in the payment of the bond, and by permission of one of them, Meacham went into possession of the premises. Whilst he was in possession, the mortgagors

executed to him a power in terms authorizing him to sell and convey the premises in his own name. In pursuance of the terms of this power, he sold and conveyed the premises to one Finley, for the consideration of seven thousand eight hundred dollars. The deed bears date July 6, 1850, and recites the power. Through this deed the landlord of the defendant traces his title, and the principal question for determination relates to the sufficiency of the title thus acquired to resist a recovery of the plaintiff, claiming through subsequent deeds, taken with only such notice of the landlord's interest as could arise from the possession of his tenant.

The defendant takes two positions: 1. That the legal title to the premises passed by the deed; and 2. If this be not sustained, then that an equitable title was created, which, having been followed by possession, is sufficient to defeat the action.

The transfer of the legal title is asserted on two grounds: one, that Meacham, as mortgagee in possession after condition broken, was clothed with the fee; and the other, that he was invested with authority to convey the whole estate by the special power from the mortgagors.

The first ground proceeds upon the common-law doctrine of mortgages, which does not prevail in this state. At common law, a mortgage is considered as a conveyance of a conditional estate, which becomes absolute upon breach of the condition. But "in this state," as we said in *Goodenow v. Ewer*, 16 Cal. 467 [76 Am. Dec. 540], "a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a lien or encumbrance only. Here, the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common-law doctrine,—that the mortgage is a conveyance of a conditional estate,—there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common-law views of the subject, and a hesitation by the courts to carry either view to its legal consequences. In *McMillan v. Richards*, 9 Cal. 365 [70 Am. Dec. 655], we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged

cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances: See *Nagle v. Macy*, 9 Cal. 426; *Haffley v. Maier*, 13 Id. 13; *Koch v. Briggs*, 14 Id. 256 [73 Am. Dec. 651]; *Clark v. Baker*, Id. 612 [76 Am. Dec. 449]; *Johnson v. Sherman*, 15 Id. 287 [76 Am. Dec. 481]. When, therefore, a mortgage is here executed, the estate remains in the mortgagor, and a mere lien or encumbrance upon the premises is created."

The counsel of the defendant do not controvert the doctrine thus stated as applicable to mortgages executed since the statute of 1851, but appear to consider that it was not intended to embrace mortgages previously executed. In this view, they are only partially correct. The doctrine was established, not merely from a consideration of the provisions of the statute, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind. In truth, mortgages had long before lost, for nearly all purposes, their common-law character as conveyances, and been regarded as transactions by which security was furnished by a pledge of real estate for the payment of debts. Courts of equity, from an early date, had so regarded them; and courts of law, by "a gradual and almost insensible progress," as Kent observes, had adopted the equitable view of the subject, though, we may add, not always carrying the equitable doctrine to its logical result: 4 Kent's Com. 160. The equitable doctrine had prevailed to such an extent that in nearly all the states the interest of the mortgagee was treated by the courts of law as real estate only so far as it was necessary for the protection of the mortgagee, and to give him the full benefit of his security. Thus in *Ellison v. Daniels*, 11 N. H. 274, the court said: "The right of the mortgagee to have his interest treated as real estate extends to and ceases at the point where it ceases to be necessary to enable him to protect and to avail himself of his just rights, intended to be secured to him by the mortgage. To enable the mortgagee to sell and convey his estate, is not one of the purposes for which his interest is to be treated as real estate. There is no necessity that it should be so treated for that purpose. That can be equally well effected in the usual way of assigning and transferring the debt secured by the mortgage. The mortgagee is secured and fortified in all his rights without the adoption of any such principle, and the plain purposes of a

mortgage forbid it. The object of the mortgage is the security of the debt; and it is obvious reason that he only who controls the debt should control the mortgage interest." In that case, the demandant was mortgagor, and the tenant claimed title under the mortgagee by various mesne conveyances, executed after the law-day; and it was held, in accordance with the views expressed in the above citation, that nothing passed to the tenant. So in *Jackson v. Willard*, 4 Johns. 41, it was held that lands mortgaged could not be sold under execution against the mortgagee, though the estate, according to the terms of the instrument, had become absolute. And in *Jackson v. Bronson*, 19 Id. 325, a mortgagor in fee sustained ejectment against the grantee of the mortgagee, the court holding the assignment of the interest of the mortgagee in the land, without an assignment of the debt, a nullity. See also *Ewer v. Hobbs*, 5 Met. 3; *Howard v. Robinson*, 5 Cush. 123; and 1 Hilliard on Mortgages, c. 18, and cases there cited.

It was from a consideration of the character of the instrument, as settled by these decisions, and the modern cases generally, that we were induced to adopt the equitable doctrine as the true doctrine; and it was from a consideration of the provisions of the statute which led us to go beyond those cases, and carry the doctrine to its legitimate and logical result, and regard the mortgage as a security under all circumstances, both at law and in equity. Mortgages, therefore, executed before the statute, can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded at all times as mere securities, creating only a lien or encumbrance, and not passing any estate in the premises: *Fogarty v. Sawyer*, 17 Cal. 592; *Lord v. Morris*, 18 Id. 487, 488.

As the mortgage is a mere security, it is plain that default in the payment of the debt secured cannot change its character. Payment after default will operate as an extinguishment of the lien equally as payment at the maturity of the debt. "Indeed, in those courts, with some few exceptions, where the common-law view of mortgages is the most strictly adhered to, payment of the debt," as we said in *McMillan v. Richards*, 9 Cal. 365 [70 Am. Dec. 655], "is held to revert the estate without a reconveyance in the mortgagor, though it is difficult to see upon what principle. If the mortgage is a conveyance after default, it must be equally so before; the only difference being that in the one case the estate conveyed is conditional,

and in the other, absolute. If, after default, the estate be absolute, it is not easy to perceive how the grantee can be divested without deed under the statute of frauds; and yet, according to the general doctrine of the modern cases, payment has that effect": *McMillan v. Richards*, 9 Cal. 411 [70 Am. Dec. 655]. This general doctrine is inconsistent with the theory that the mortgage is a conveyance after default, but is consistent with the theory that it is only an instrument of security.

Was the interest of the mortgagee affected by the fact that he was in possession of the premises? According to the language of many of the adjudged cases in other states, the taking of possession after condition broken is considered as in some way enlarging the rights of the mortgagee. Thus, in New York, he is said to have before possession only a chattel interest, but after possession taken to have the title of the mortgagor. For this reason the mortgagee of a term in possession is there held liable as assignee upon the covenants of a lease, but is not held liable if out of possession: *Astor v. Hoyt*, 5 Wend. 603.

Upon this point, the observations of Mr. Chief Justice Homer of the supreme court of Connecticut, in *Clark v. Beach*, 6 Conn. 142, appear to us to have great force, though he differed with his associates. In that case, a mortgage deed was admitted in evidence to sustain the defendant's plea of title. The mortgagee was in possession, and the law-day had expired. The chief justice was of opinion that the deed should have been rejected; and in reply to the statement on the argument that the mortgagee's possession had enlarged his title, said: "In my judgment, a more gratuitous assertion cannot be made. There is nothing in the nature of this fact *per se* that adds to the mortgagee's title, or the title of any other person. Before entry, the grantee of land, except where possession is requisite to commence a right, has title not enlarged by subsequent occupation; as such occupation confers not any right, but merely gives the enjoyment of a right antecedent. If the supposition, which neither principle nor analogy countenances, were true, that the possession of the mortgagee gives him seisin of the freehold, he would always be seised, for he would never fail to enter. After possession, just as before, the estate mortgaged is a pledge only; the relation of creditor and debtor exists; the equity of redemption is unimpaired; or if the law-day has not elapsed, the payment of the debt annihilates all

the rights of the mortgagee, and everything is *in statu quo*. All this is true until foreclosure is effected. Then it is that the mutual relation of the parties becomes changed. There is no longer a mortgage or pledge, a creditor or debtor, a mortgagor or mortgagee, or an equity of redemption. The mortgaged premises, by a legal appropriation thereof, are lost to the mortgagor forever, and the mortgagee has become tenant in fee-simple."

But it is not necessary to argue the point upon principle, for it has been expressly decided in this court. In *Johnson v. Sherman*, 15 Cal. 287 [76 Am. Dec. 481], an assignment was executed to the defendant of a leasehold interest in certain premises as security for a loan of money. The assignment was therefore in fact a mortgage. The defendant took possession, and continued in possession after the loan made had matured, and the question presented was, whether, as mortgagee of the term in possession, he was liable upon the covenants of the lease. According to the authorities of New York, to which we have already referred, a mortgagee of a term out of possession is not thus liable, because he has then only a chattel interest; but in possession is held liable, because he is then considered to have the title of the mortgagor. The point for determination therefore was, whether in this state the fact of possession affected the interest of the mortgagee. The court held that it did not. After stating that default in payment did not change the character of a mortgage, the court said: "Nor can possession under the mortgage affect the nature of the mortgagee's interest; it does not abridge or enlarge his interest, or convert what was previously a security into a seisin of the freehold; it does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. Possession taken by consent of the owner, or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support."

It follows, from the views we have expressed, that Meacham, as mortgagee after condition broken, whether in possession or out of possession, could not convey the legal title. He did not hold it. He held, by virtue of the mortgage, only a lien upon the premises, and that was a mere incident of the debt. His deed, therefore, as mortgagee alone, without a transfer of the debt, passed nothing: See cases cited above. †

Although a mortgage in this state of itself confers no right of possession, yet when possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party. And unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor, and all others, until such satisfaction is obtained. And though the legal title to the premises is not held, and as a consequence cannot be conveyed by the mortgagee, the temporary possessory right thus acquired may be transferred. The transferee will be substituted to his position, and be subjected to the same liabilities,—that is to say, the rents and profits received by the transferee will be treated as received by the mortgagee, and applied to the discharge of the debt: *Smith v. Smith*, 15 N. H. 55.

In the present case, the mortgagee went into possession by consent of one of the mortgagors, and it would seem, without objection from the other mortgagors; but he did not convey, or attempt to convey, any possessory rights which he may have thus acquired, or his interest generally. His deed only purports to transfer such interest as he could convey as mortgagee, and by virtue of the power already referred to from the mortgagors.

The question then arises as to the effect of the conveyance as executed under the power. The testimony of the mortgagee as to the contents of the power, for the instrument itself was lost, shows that in terms it authorized him to sell and convey the premises in his own name, and apply the proceeds to the payment of the debt, but it fails to show positively that the power was under seal. The mortgagee testifies that he has no distinct recollection whether the power was under seal or not, but thinks that it was sealed, as he was in the habit of putting a seal to all instruments connected with the transfer of real estate. He was an auctioneer at the time, and frequently sold real estate. The presumption from this habit, if any presumption could be indulged at all, would be that the power in question was sealed. The evidence, clearly, does not

warrant the finding of the referee that it was not under seal. But as the case must go back for a new trial upon the last proposition of the appellant, it is unnecessary to express any opinion whether, if the power were in fact under seal, the conveyance from Meacham in pursuance of it was sufficient to pass the legal title. Assuming that it was not under seal, and that therefore it was insufficient to authorize the execution of the conveyance of the fee, it was sufficient to authorize the execution of a contract of sale. And the instrument in question, reciting the sale, is a sufficient "note or memorandum" of such contract; in other words, if the deed executed was inoperative as a conveyance, it was good as an agreement to convey. And the purchaser having paid the purchase-money, and entered into possession of the premises, a court of equity will protect him, and parties claiming under him, against subsequent purchasers with notice. This protection the court will afford by enjoining any interference with the premises on the part of the adverse claimants, or by directing a conveyance of the title from them, or in such other manner as will most effectually quiet the possession. The inquiry then arises, whether the plaintiff purchased the legal title—treating the instrument executed by Meacham as a mere agreement to convey—with notice of the equity of the landlord of the defendant. The plaintiff traces his title by conveyance from the surviving assignee of Finley, Johnson, and Austin, and from the surviving member of the firm. On the 15th of July, 1850, Finley, Johnson, and Austin, being unable to pay their debts, made a general assignment of all their real and personal property to Spence and Bowie upon certain trusts. On the 2d of March, 1859, Johnson, the sole surviving member of the firm of Finley, Johnson, and Austin, executed a deed of the premises in controversy to the plaintiff. On the 21st of March, 1859, Spence, the sole surviving trustee under the assignment, also executed a deed of the same premises to the plaintiff. At the time the assignment in July, 1850, was made, Finley, the purchaser from Meacham, was in the open, notorious, and exclusive possession of the premises; and at the time the two deeds were executed to the plaintiff, the defendant was in like possession. There is no doubt that this possession was sufficient to put the plaintiff upon inquiry as to the interest, legal or equitable, which the defendant held: *Lestrade v. Barth*, 19 Cal. 660; *Hunter v. Watson*, 12 Id. 363 [78 Am. Dec. 543]; *Pritchard v. Brown*, 4 N. H. 404 [17 Am.

Dec. 431]. But when the plaintiff ascertained that the defendant was a tenant under Wheelock, was he bound to extend his inquiry to the interest of the landlord,—in other words, was the possession of the tenant notice of the landlord's title? In *Smith v. Dall*, 13 Cal. 510, this question was answered in the negative by Mr. Chief Justice Terry; but as there was only a special concurrence in the judgment in that case, the opinion filed by him is not an authoritative statement of the law binding upon us. The opinion was based upon a *dictum* of Sugden, and observations in *Flagg v. Mann*, 2 Sum. 555, where Mr. Justice Story, in adopting the view of Sugden, substantially admits that there is no authority for the position, except the great experience and acknowledged ability of the author. To our minds, a persuasive argument against the doctrine is found in the statement by Sugden of the consequences to which it would lead. "Therefore," he says, "if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bona fide*, and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession": 2 Sugden on Vendors, 558.

On the other hand, the opposite doctrine is asserted or assumed to be law in numerous cases: *Pittman v. Gaty*, 5 Gilm. 186; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Diehl v. Page*, 3 Id. 143; *Hanly v. Morse*, 32 Me. 287; *Veazie v. Parker*, 23 Id. 171. And it is not easy to give to the fact of possession any influence as notice, without making it notice of all such matters as a prudent man, desirous of purchasing the property, would naturally inquire about, respecting the title. Ascertaining that the possession of the occupant is that of a tenant, he would, in the ordinary course of things, proceed to inquire as to the title of the landlord.

The judgment must be reversed, and the cause remanded for further proceedings; and it is so ordered.

NORTON, J. I agree with the opinion of the chief justice upon the point that the instrument executed by Meacham was a sufficient agreement in writing for a sale of the premises by his principals, and that the defendant, being in possession by permission of those principals, in consequence of such instrument being executed, and having paid the purchase-money, is entitled to be protected by the equity powers of the court from an action of ejectment by those principals, or those claiming

under them, until, at least, an opportunity may be had to acquire the legal title.

I also agree that the possession by the defendant, as tenant, was notice to put the plaintiff at the time of his purchase on inquiry, and was thus sufficient to charge the plaintiff with notice of the equitable rights of the landlord, under whom the defendant held.

As the case must turn upon these two points, I do not deem it necessary to express an opinion upon the other matters which are discussed by the counsel.

I concur in the decision that the judgment should be reversed, and the cause remanded.

COPE, J. I concur in the judgment of reversal, but do not consider it necessary to pass upon some of the questions discussed in the opinion of the chief justice.

MORTGAGE IS, IN SOME STATES, REGARDED AS MERE SECURITY, and not as a conveyance: See cases in this series collected in the note to *Carroll v. Ballance*, 79 Am. Dec. 360; *Bhant v. Walker*, 78 Id. 700, note 718; note to *Kertricht v. Cady*, Id. 159; *Johnson v. Sherman*, 76 Id. 481, note 488; *Goodness v. Ever*, Id. 540, note 550; *Witherell v. Wiberg*, 4 Saw. 235; *Heyland v. Badger*, 35 Cal. 413; *Mack v. Wetler*, 39 Id. 255, all citing the principal case. But in other states, the mortgage conveys the legal title to the mortgagee: *Carroll v. Ballance*, 79 Am. Dec. 354, and note 360, where other cases holding that view are collected.

POSSESSION BY MORTGAGEE IN CALIFORNIA, TAKEN BY CONSENT OF OWNER, or by contract with him, may confer rights as against third parties, but they are independent, and distinct from any rights springing from the mortgage from which they derive no support: *Johnson v. Sherman*, 76 Am. Dec. 481.

TITLE OF GRANTEE OF MORTGAGED PREMISES IS NOT AFFECTED BY FORECLOSURE of the mortgage in a suit commenced after the conveyance by the mortgagor, unless the grantee is made a party to the suit: *Carpentier v. Williamson*, 25 Cal. 161, citing the principal case.

POSSESSION UNDER MORTGAGE DOES NOT, IN CALIFORNIA, AFFECT NATURE OF MORTGAGEE'S INTEREST: *Johnson v. Sherman*, 76 Am. Dec. 481.

MORTGAGEE WHO TAKES POSSESSION, AND RECEIVES RENTS AND PROFITS of the mortgaged premises, becomes accountable for them, and is bound to apply them to the reduction of the debt: *Harrison v. Wyse*, 63 Am. Dec. 151, note 154. Though a mortgage does not of itself confer any right of possession, yet when possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured: *Witherell v. Wiberg*, 4 Saw. 238, citing the principal case.

EJECTMENT MUST BE BROUGHT AGAINST OCCUPANT of the premises: *Harrison v. Reichert*, 28 Cal. 536, citing the principal case.

TENANT CANNOT INTERFERE WITH SUBSEQUENT PROCEEDINGS, to the prejudice of his landlord, after the tenant has notified the landlord of the pendency of an action of ejectment, and permitted him to appear and defend: *Valentine v. Mahoney*, 37 Cal. 394, citing the principal case.

POSSESSION OF LAND AS CONSTRUCTIVE NOTICE OF TITLE: See *Bloomer v. Henderson*, 77 Am. Dec. 453, note 459, where other cases are collected; *Morrison v. Kelly*, 74 Id. 169, note 178. Open, notorious, and exclusive possession is sufficient to put a purchaser upon inquiry: *Fair v. Stevens*, 29 Cal. 491; *Pell v. McElroy*, 36 Id. 271, both citing the principal case. And possession of a tenant is notice of the title of his landlord: *Thompson v. Pioche*, 44 Id. 516, also citing the principal case. But if, at the time of the sale of land, the record title is in the vendor, and he is also in possession, there is no presumption of title out of the vendor, and no inquiry need be made of other persons as to his right or title: *Jeffersonville etc. R. R. Co. v. Opler*, 82 Ind. 405, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Whedock v. Warschauer*, 34 Cal. 288, to the point that an eviction of the tenant by a title paramount to the title of the landlord determines the tenancy.

INDEX TO THE NOTES.

- AGENT**, notice of revocation of authority, actual, when necessary, 633.
notice of revocation of authority is essential, 637.
notice of revocation of authority, how given, 633.
- ANIMALS**, injury to, while trespassing, 159.
removal of trespassing, 159.
- ASSAULT** committed in defense of one's possession, 674.
- ASSIGNMENT** of non-existing but expected funds, 349.
- BANKS** certifying check, effect of, 336.
- BILL OF EXCHANGE**, acceptance, what amounts to promise to make, 493.
- BONDS** of deputy, 764.
of officer *de facto*, 764.
official, approval, defects in or omission of, 763.
official, blanks left to be filled up, 763.
official, defects which do not invalidate, 762.
official, exacted with stipulation not required by statute, 761.
official, failure to approve, 764.
official, failure to conform to statute, 760.
official, form of, statute prescribing is generally directory, 760.
official, imposing obligations beyond those prescribed by law, 760.
official, may be good as a voluntary obligation, 761.
official, penalty of, which is greater than required, 760.
official, taken by person authorized to take it, 761.
official, where new duties are imposed, 761.
- BURIAL OF THE DEAD.** See **DEAD**.
- CHOSES IN ACTION**, purchaser of, what equities bound by, 249.
- COMMON CARRIER**, contract exempting from liability, 290.
liability of one who is both carrier and warehouseman, 363.
liability of connecting, 363.
of persons, 294.
- CONDITIONS** divesting estates are strictly construed, 172.
- CONSTITUTIONAL LAW**, statute authorizing guardian or administrator to sell land, 155.
statute having more than one subject or object, 110, 111.
- CONTRACT**, avoiding, for party's own fraud, 423.
executory, party's own fraud as defense to action on, 423.
performance, not excused by accident or casualty, 655.
rescission by vendee on becoming insolvent, 323.
- CONVEYANCE**, intent of, must be expressed by apt words, 243.
words necessary to pass a fee, 243.
- COSTS**, non-resident, security required of, 251.

CO-TENANCY, bill, by co-tenant of mine, to obtain possession, 536.
CRIMINAL LAW, bigamy, proof of marriage in prosecution for, 369.

DEAD, burial of, church-yards, rights in, for burial purposes, 511.
 burial of, husband is bound to bury his wife, 512.
 burial of, husband is liable to third person for burying his wife, 512.
 burial of, husband's rights with respect to grave of wife, 512.
 burial of, jurisdiction of courts respecting, place and rites of, 512.
 burial of, law controlling, in United States, 511.
 burial of, modes permissible, 510.
 burial of, on whom duty of rests, by canon law, 510.
 burial of, on whom duty of rests, by civil law, 510.
 burial of, place for, by ecclesiastical law, 510.
 burial of, right to select place of, and to preserve and care for it, 512.
 burial of, right to, in church-yards, 511.
 burial of, right to provide for by will, 510.
 cemeteries for, 509.
 cemeteries, title to lands in, 513.
 expense of burial, who bound for, 516.
 executor's duties respecting burial, 516.
 persons whose duty it is to furnish sepulture, 511.
 property in bodies of, 513.
 removal of body after burial, 511, 514.
 removal of body after burial, legislature may authorize, 512.
 removal of body after burial, without authority, 515.
 sepulture of, and right to direct, 509, 510.
 taking bodies for dissection, 513.

DEFINITION of homestead, 117.

of passengers, 293.

DIVORCE, abatement of suit by death of party, 197.

death of either party pending suit for, 199.

death of either party, writ of error or appeal after, 199.

English decree of, is not final until three months, 197.

English decree *nisi* cannot be made absolute after death of either party, 198.

suit for, against insane person, 200.

suit for, by insane person, 200.

suit for, prosecuted by guardian, 200.

third persons cannot procure vacation of, 200.

third persons cannot prosecute after death of one of the parties, 198.

DURESS, by threatening with prosecution for crime, 400.

contract entered into to procure release from arrest, 400.

EASEMENT, title by adverse user, 496.

ESTOPPEL, to allege party's own fraud, 428, 429.

EVIDENCE, admissions, part cannot be excluded and part admitted, 343.

burden of proof in action for breach of covenant of seisin, 710.

books of account, the whole must be admitted, 345.

conversation, what part may be omitted, 342.

letters, what part may be omitted, 345.

parol, to explain doubtful terms in contract, 668.

parol, to show purpose or consideration of negotiable instrument, 51.

receipts, what part may be omitted, 344.

- EXEMPTION**, exempt property, exemplary damages for levy on, 90.
 garnishment of municipal corporation, 670.
 redemption from sale, title pending time for, 573.
 sale, who entitled to protection as purchaser without notice, 613.
 satisfaction presumed from levy, 157.
 tools, what exempt as, 645.
- FIXTURES**, rolls in rolling-mills, 570.
- FOREIGN JUDGMENT**, authentication of, 411.
 conclusiveness of, in England, 413.
 conclusiveness of, in United States, 413.
 fraud in procuring, 412.
 jurisdiction of court may always be questioned, 412.
- FRAUD** in which party participated, as defense to his contracts, 423, 429.
- GARNISHMENT** of municipal corporation, 670.
- HOMESTEAD**, occupation essential to, 712.
- INSURANCE** by wife on husband's life, non-assignability of, 400, 401.
 conditions and exceptions in policy, how construed, 506.
 estoppel by acts of agent, 722.
 estoppel to urge mistake or omission in application, 723.
 on life of another, 399.
- JUDGMENT** against one tort-feasor, whether bars action against others, 567.
 certification by deputy, 315.
 foreign, 411-414.
 lien of, conflict between, and unrecorded deed, 613.
- LARCENY**, indictment for, must show that property was taken without owner's assent, 607.
 possession of stolen property as evidence of guilt, 607.
- LEASE** on shares makes parties tenants in common, 54.
- MASTER**, liability for injuries suffered by servant, 321.
 liability for willful act of servant, 526.
- MARSHAL**, United States, actions against in state courts, 95.
- MORTGAGE**, assignment of, when prevails over pre-existing equities, 53.
 canceled by mistake, 272.
 foreclosure, grantee of mortgagor must be party, 775.
 release by first mortgagee while there is a second, 257.
 rents and profits, rights of mortgagee in possession, 775.
- MUNICIPAL CORPORATION**, garnishment of, 670.
 not liable when exercising legislative powers, 64.
 ordinance imposing penalty or forfeiture, 487.
 ordinance requiring baskets to be marked, 487.
- NEGOTIABLE INSTRUMENTS**, indorsements, parol evidence to vary, 108.
 may be put in evidence without indorsements, 104.
 notarial certificate as evidence, 108.
- NEWSPAPER**, liability of person receiving from post-office, 194.
- NOTICE** of revocation of agency, necessity for, 637.
 possession of land as evidence of, 776.

PARTNERSHIP bound by fraud or misrepresentation of partner, 395.

PERSONAL PROPERTY, force in retaking possession of, 677.

land, entry on to take possession of, 676.

retaking possession of, 676.

POSSESSION, adverse, when extends to boundaries in deed, 746.

assault in defense of, 674.

defense of, against wrong-doer, 674.

is evidence of ownership, 747.

retaking by owner, force which may be used, 674, 676.

wounding or maiming in defense of, 674.

PRINCIPAL AND AGENT, representations of agent, 395.

PUBLIC LANDS, entry of, by one person in trust for another, 101.

RAILROAD COMPANY, agents and messengers of other corporations traveling on, 292.

breaking axle, liability to passenger, 403.

broken rail, liability to passenger, 404.

contract to limit liability, 379.

drover's pass, rights of holder of, 291, 292, 379.

forfeiture of franchise by, 301.

free pass, gross neglect, holder may recover, 292.

free pass, rights of holder, 291.

gratuitous passenger, contract of, waiving right to damages, 290.

gratuitous passenger may recover for neglect of directors, 290.

RAPE, evidence of acts of unchastity on part of prosecutrix, 447.

REAL ESTATE, entry on, to remove one's chattels, 676.]

retaking possession from wrong-doer, 676.

RECOUPMENT, what may be set up in, 359.

REDEMPTION from execution sale by owner, effect of, 123.

REFLEXIN in state court against United States marshal, 94.

injunction to restrain abuse of franchise, 302.

liability for acts of officers, 525.

mandamus to compel running trains, 302.

negligence, contracts waiving right to sue for, 291.

passengers may recover for acts of officers, 526.

passengers defined, 293.

passengers, presumption that one riding on car is, 293.

taking up track, 301.

trespasser on cars, rights of, 293.

vehicles, must furnish roadworthy, 404.

SALE, chattel must be identified and set aside to pass title, 667.

of chattels, concurrent possession of vendor and vendee after, 554.

remedy in case vendee refuses to accept goods, 667.

STATUTE, retrospective operation not given to, 698.

SUBSCRIPTION, recovery on, when proper, 121.

SUNDAY, acts performed on, when valid, 121.

carrier's liability for injury done passengers, 307.

contracts made on, 307.

statutes respecting, are valid, 121.

TAXATION, omitting property from assessment roll, when avoids the whole assessment, 719.

TAX DEED, description, when void for uncertainty, 747.

- TRADE MARK OR NAME**, restraining use of, 753.
- TREES** belong to him on whose land the trunk stands, 330.
 overhanging branches, remedy against, 331.
 standing across boundary line, 330.
- TRESPASS**, killing done in resistance of, 675.
 removing trespasser, 675.
 right of owner to resist, 674.
- TRIAL**, right to open and close, 189.
- TRUSTS**, resulting, are not subject to registration laws, 613.
- WATERCOURSE**, dam-owner's right to flow back, 188.
 percolating waters, right to divert, 188.
- WIFE**, action for injury to, 678.
- WILLS**, contesting, burden of proof respecting mental incapacity, 129.
 joint, when valid, 485.



INDEX.

ABANDONMENT.

1. QUESTION OF ABANDONMENT OF PROPERTY IS ONE OF INTENTION of which the jury is to judge exclusively, and in order to do so they must take into consideration all the facts and circumstances before them. *Kenns v. Connors*, 733.
2. ABANDONMENT MAY BE INFERRED IN SOME CASES FROM LAPSE OF TIME, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises; but in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession. *Id.*
3. WHERE PERSON, WHEN HE CEASES TO OCCUPY PREMISES IN PERSON, LEAVES AGENT in charge of them, this fact is in itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question whether, in fact, he did or did not abandon them, one for the consideration of the jury. *Id.*

See RAILROADS, 1.

ACCOUNTS.

See EXECUTORS AND ADMINISTRATORS, 17-23.

ACT OF GOD.

See COMMON CARRIERS, 1, 2.

ADMIRALTY.

1. VESSEL LIEN LAW OF NEW JERSEY APPLIES TO FOREIGN as well as to domestic vessels. *Randall v. Roche*, 233.
2. LIEN FOR SUPPLIES FURNISHED FOREIGN VESSEL ON CREDIT OF OWNER OR MASTER IS NOT MARITIME LIEN, within the jurisdiction of courts of admiralty of the United States, but may be provided for by state statutes, and enforced by state courts. *Id.*
3. LIEN FOR SUPPLIES FURNISHED FOREIGN VESSEL IS NOT EXCLUDED FROM STATE COGNIZANCE, by the provision of the United States constitution giving to Congress the power to regulate commerce with foreign nations, and among the several states, if Congress has not legislated on the subject. *Id.*
4. ADMIRALTY JURISDICTION OF UNITED STATES COURTS IS EXCLUSIVE; but it is jurisdiction over admiralty causes, and not jurisdiction over all causes affecting foreign vessels, or over all liens on such. *Id.*

ADULTERY.

See MARRIAGE AND DIVORCE, 1, 2, 5.

ADVERSE POSSESSION.

See EASEMENTS, 3.

AGENCY.

1. **PRINCIPAL AND AGENT.**—By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent. *Tier v. Lamson*, 634.
 2. **IMPLIED AUTHORITY OF AGENT ARISING FROM GENERAL EMPLOYMENT** CONTINUES after the agency has in reality ceased, as far as concerns parties who have given credit before, and still continue to give credit to it, and who have not actually been notified of the change, and cannot be presumed to have had notice of it. *Id.*
- See ABANDONMENT; CONTRACTS, 6; CORPORATIONS, 1; FACTORS; GUARDIAN AND WARD, 2; INSURANCE, 2, 3; PARTNERSHIP, 1.

ALTERATION OF INSTRUMENTS.

See AUTHENTICATION OF INSTRUMENTS, 5.

ANIMALS.

1. **LIABILITY FOR INJURY TO TRESPASSING ANIMALS.**—A person upon whose land an animal strays may turn it off, using the usual and ordinary caution to avoid doing any injury to it; but is liable to the owner of the animal for any injury which results to it from a failure to exercise such caution. *Totten v. Cole*, 187.
2. **OWNER OF CATTLE FOUND ON UNFENCED RAILROAD IS NOT TRESPASSER** or wrong-doer, but is entitled to the exercise of ordinary and reasonable care on the part of the railroad company, under all circumstances, to avoid any injury to his cattle. *Central Ohio R. R. Co. v. Lawrence*, 434.
3. **RAILROAD COMPANY OPERATING UNFENCED ROAD IS NOT LIABLE FOR INJURIES TO CATTLE** found on its track, if its use of the track is reasonable, and it exercises reasonable care under all circumstances to avoid the injury; but for an injury to cattle resulting from the unreasonable and dangerous use of the railroad, or from the want of such care, the company will be liable. *Id.*
4. **RAILROAD COMPANY IS NOT BOUND TO CONSIDER INCREASED RISK TO CATTLE** on its unfenced track in determining the rate of speed at which its trains shall run, such speed being otherwise reasonable and proper in view of the object to be accomplished. A high rate of speed, though dangerous, is a reasonable use of the land, because it is for a proper object, and a highly beneficial purpose, and the danger may be avoided by proper care. *Id.*
5. **OWNERS OF CATTLE WHO PERMIT THEM TO RUN AT LARGE** in the vicinity of an uninclosed railroad track can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of its road, the capacity of its locomotive power, and the safety of the persons and property carried, shall, with due regard to the safety of the persons and property in their charge as the paramount consideration, exercise ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road. *Id.*

6. WHERE THERE IS NOTHING IN RUNNING OF TRAIN OR ITS RATE OF SPEED at a particular time and place inconsistent with the general and legitimate conduct of the business of the railroad company, the occasion and necessity therefor do not concern the owner of cattle running at large, and he cannot inquire whether the rate of speed was greater than usual for a particular train at a particular place, and what was the object of such rate. *Id.*
 7. WHERE IT DOES NOT APPEAR THAT RATE OF SPEED AT WHICH TRAIN WAS RUNNING was a rate at which the railroad company, in the ordinary and legitimate conduct of its business, might not reasonably run its train, the inquiry in an action for injuries to cattle on an unclosed track must be confined to the question whether, under the circumstances of the case, the defendants exercised reasonable and proper care in running their engine to avoid injury to the cattle of the plaintiff, and this question is for the jury. *Id.*
 8. WHERE THERE IS NO SUFFICIENT POUND IN TOWN, the person taking the animal up may impound it in his own barn, or in the inclosure of some other person. *Riber v. Hooper*, 646.
 9. ACTION FOR EXPENSES OF KEEPING IMPOUNDED ANIMAL, and for the penalty provided for in the statute, in a town where there is no public pound, where the person who impounds the animal places it in the barn of the public pound-keeper elected by the town, because he was pound-keeper, and in his official capacity, and where the impounder had never paid anything, or agreed to pay anything for the costs of keeping, must be brought by the pound-keeper, and not by the impounder. *Id.*
 10. FORFEITURES PROVIDED IN STATUTE RELATING TO IMPOUNDED ANIMALS DO NOT INCLUDE the expenses of keeping the animal impounded. But both may be recovered in the same suit. *Id.*
 11. LIMITATION OF NINE MONTHS DOES NOT APPLY to actions for forfeitures and expenses under the statute relating to impounding animals. *Id.*
- See JUDGMENTS, 7.

ARBITRATION AND AWARD.

See EXECUTORS AND ADMINISTRATORS, 9-15; TRUSTS, 2, 4.

ASPORTATION.

See CRIMINAL LAW, 4.

ASSAULT AND BATTERY.

1. DAMAGES FOR WIFE'S LOSS OF TIME CANNOT BE RECOVERED in joint action by husband and wife for an assault and battery upon the wife. The time and services of the wife belong to the husband, and for their loss he must sue alone. *Barnes v. Martin*, 670.
2. DAMAGES MAY BE RECOVERED, IN ACTION FOR ASSAULT AND BATTERY, for circumstances of outrage and insult which wound the feelings, and tend to lower the party aggrieved in the estimation of his fellow-citizens; but not for any public odium which might arise from an exposure, at the trial, of the domestic quarrels of the husband and wife who sue for an assault and battery upon the wife. *Id.*

See PLEADING AND PRACTICE, 2; RECAPTION, 2.

ASSIGNMENTS.

See DURESS; FACTORS, 2; MORTGAGES, 20.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

ASSIGNMENT FOR BENEFIT OF CREDITORS under insolvent laws of another state vests such title in the assignee as to property of the debtor situated in Missouri, as to defeat an attaching creditor who is a citizen of and resides in such other state, but sues in the courts of Missouri to gain a preference over creditors in the other state, where all of the parties reside, and where the debt sued upon was contracted and made payable. *Eller v. Bost*, 129.

ASSUMPSIT.

See NEWSPAPERS.

ATTACHMENT.

1. **MUNICIPAL CORPORATION IS NOT SUBJECT TO GARNISHMENT.** *Burkham v. Fox de Lac*, 668.
2. **JUDGMENT CREDITOR ACQUIRES LIEN BY SERVICE OF WRIT OF GARNISHMENT ON JUDGMENT DEBTOR OF HIS DEBTOR**, which the garnishee cannot defeat by afterwards acquiring an equitable set-off against the judgment. *Warfield v. Campbell*, 724.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

ATTORNEY AND CLIENT.

ATTORNEY HAS LIEN ON JUDGMENT OR DEBTS OBTAINED BY HIM FOR HIS CLIENT, to the extent of his fees, or compensation for his services in the cause, which is superior to an equitable set-off afterwards acquired by the defendant. *Warfield v. Campbell*, 724.

AUTHENTICATION OF INSTRUMENTS.

1. **FOREIGN COUNTRY—AUTHENTICATION OF JUDGMENT.**—Our statute providing for the admission of duly authenticated judgments of foreign countries, does not relate alone to the independent powers of the world. Its obvious meaning is to admit the records of any court of any foreign country; it is immaterial whether such foreign country is one of the great powers of the world, or one of minor importance. *Lanier v. Westcott*, 404.
2. **ATTESTATION OF JUDGMENT IN STATE COURT, SIGNED ONLY BY DEPUTY CLERK, IS INSUFFICIENT**, under the act of Congress, for the purpose of making it evidence in another state, and the insufficiency is not cured by the addition of the judge's certificate that the attestation is in due form, and authorized by the state law. *Morris v. Patchin*, 311.
3. **RECORD OF JUDGMENT MUST BE SIGNED BY OFFICER AUTHORIZED BY LAW**, and must have been filed in the proper office, in order to make it evidence. *Id.*
4. **RECORD OF JUDGMENT OF COURT OF PROVINCE OF UPPER CANADA** is duly authenticated by attestation of the clerk of the court, with the seal of the court annexed, to which is attached the proper certificates of the chief justice of the court, of the assistant secretary of state of the province, and of the governor in chief of said province, to which is affixed the great seal of the province. *Lanier v. Westcott*, 404.

8. **WRASURES AND INTERLINEATIONS APPEARING UPON FACE OF EXEMPLIFICATION OF RECORD OF JUDGMENT** of a foreign country, if they are verified by the initials of the clerk of the court, will be presumed to have been made by him at the time he authenticated the roll, and are immaterial. *Id.*

See MORTGAGES, 11, 12.

RAILMENTS.

- POSSESSION OF BAILER IS POSSESSION OF BAILOE**; so held where slaves belonging to a ward had been hired by her guardian to the bailee for a year. Also held that such possession of the guardian was the possession of the ward. *Salles v. Arnold*, 144.

See GUARDIAN AND WARD, 1, 2.

BANKS AND BANKING.

1. **CERTIFICATION OF CHECK AS GOOD, BY AUTHORIZED OFFICER OF BANK**, binds the bank to keep funds to pay it; it is equivalent to the acceptance of a bill of exchange payable on demand, and makes the bank primarily liable to the holder until discharged by payment, release, or the statute of limitations. *Meads v. Merchants' Bank*, 331.
2. **CERTIFICATION AS GOOD OF NOTE PAYABLE AT BANK**, where the course of business between banks is, instead of actually paying the notes of customers when in funds on presentment, to mark them as good, and settle in the exchanges of the next day, has the same effect as has the certification of a check, and operates as an absolute engagement of the bank to pay its own debt, and not as a guaranty or promise for the benefit of a third person. *Id.*
3. **BANK IS LIABLE ON NOTE FALSELY CERTIFIED BY TELLER**, the bank not having funds for its payment, to such persons only as hold in good faith and for value. *Id.*
4. **HOLDER OF NOTE CERTIFIED BY BANK TELLER AS GOOD, THOUGH FALSELY**, the bank not having funds for its payment, is entitled to recover if he, being ignorant of the falsity of the certificate, treats it as payment, and emits to charge indorsers. *Id.*
5. **DELAY BY HOLDER OF NOTE CERTIFIED BY BANK AS GOOD** to obtain actual payment at the request of the maker, and for his accommodation, will not discharge the obligation arising from the certificate. *Id.*

BIGAMY.

See CRIMINAL LAW, 6, 7.

BILLS OF LADING.

See FACTORS, 1.

BONA FIDE PURCHASERS.

1. **ASSIGNEE OF MORTGAGE, WITH KNOWLEDGE OF FRAUD IN ITS INCEPTION**, is not a bona fide purchaser, and the fact that he paid full consideration for the assignment will not aid him. *Danbury v. Robinson*, 244.
2. **BURDEN OF PROVING THAT ASSIGNEE OF FRAUDULENT MORTGAGE IS NOT BONA FIDE PURCHASER** for value, without notice of the fraud, is upon the defendant in a suit by the assignee to foreclose the mortgage. *Id.*

3. TITLE OF BONA FIDE PURCHASER OF MORTGAGE MADE TO DEFRAUD CREDITORS of the mortgagor is valid as against such creditors. *Id.*
4. RIGHTS OF BONA FIDE PURCHASER FROM FRAUDULENT GRANTEE ARE NOT IMPAIRED by the fact that judgments were recovered by the creditors against the fraudulent grantor prior to the conveyance by the fraudulent grantee. *Id.*
5. CONCEALED DEFECT OR SECRET EQUITY ARISING FROM CONDUCT OF PREVIOUS OWNERS OF PROPERTY, of which the purchaser had no notice, cannot be set up against him. *Id.*
6. PURCHASER UNDER CONTRACT INOPERATIVE AS CONVEYANCE BUT GOOD AS AGREEMENT to convey, who has paid the purchase-money and entered into possession of the premises, will be protected by a court of equity against subsequent purchasers with notice. *Dutton v. Wareschauer*, 765.
See MORTGAGES, 12; TRUSTS, 5, 6.

BONDS.

- BOND EXECUTED TO ENFORCE OBLIGES TO DEFRAUD HIS CREDITORS, IS INVALID as against the obligor. *Powell v. Inman*, 426.
- See REMOVERS AND ADMINISTRATORS, 2, 3, 5-7; FRAUD, 5; OFFICER AND OFFICERS, 1-6; SURETYSHIP.

BOUNDARIES.

See GROWING TREES.

CAVEAT EMPTOR.

See SALES, 3.

CHANGE OF VENUE.

See PLEADING AND PRACTICE, 2.

CHECKS.

See BANKS AND BANKING.

CHOSES IN ACTION.

- CHOSE IN ACTION IS THING of which one has not the possession, or actual enjoyment, but only a right to, or a right to demand by action at law. Or it is defined to be a personal right not reduced to possession, but recoverable by suit at law. *Sallee v. Arnold*, 144.

See HUSBAND AND WIFE, 2.

COLLATERAL SECURITIES.

1. WHEN ONE RECEIVES NOTE AS COLLATERAL SECURITY FOR EXISTING DEBT, GENERAL RULE IS, that the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party, by reason of a want of such care and diligence, the law will compel him to make good the loss. *Roberts v. Thompson*, 465.
2. CASES OF PERSONS WHO RECEIVE NEGOTIABLE PAPER AS COLLATERAL SECURITY, ARE NOT GOVERNED by the strict rules of the commercial law, applicable to negotiable paper, but fall under the general law of agency,

which must determine the rights and liabilities of the parties. However, if the parties make a special agreement, they will be bound by its terms. *Id.*

2. PARTY TO WHOM HAS BEEN ASSIGNED, AS COLLATERAL SECURITY, PROMISSORY NOTE, payable on or before a certain date, under an agreement by which demand and notice of non-payment are waived, is under no obligation to demand or insist upon payment of the note before it becomes due. This is so, although the maker of the note expressed willingness to pay it, and the holder, might have collected it by insisting upon payment. *Id.*

COMMON CARRIERS.

1. RULE THAT COMMON CARRIERS ARE ANSWERABLE for all losses not occasioned by the act of God or the public enemies, is founded in justice and sound policy, and should not be departed from. *Arnold v. Jones*, 617.
2. COMMON CARRIERS ARE LIABLE although they act with caution and prudence, unless the loss was occasioned by the act of God, or might not have been prevented by any possible degree of caution and effort. *Id.*
3. COMMON CARRIER OF PASSENGERS, LIABILITY FOR DEFECTIVE AXLE. — Common carriers of passengers must be held accountable, in every event, to furnish roadworthy coaches. They will be held responsible for damages caused by a cracked axle, although the defect could not possibly have been discovered by any available means. *Alden v. New York Cent. R. R. Co.*, 401.
4. COMMON CARRIERS MAY LIMIT THEIR LIABILITY FOR INJURIES TO PASSENGERS by negligence of agents or servants, by contract founded on a valuable consideration, such as abatement, in whole or part, of the legal fare; and such contracts are not contrary to public policy. *Bissell v. New York Cent. R. R. Co.*, 369.
5. CATTLE DEALER ACCOMPANYING HIS CATTLE ON TRAIN, but paying no additional fare for himself, in consideration of the fact that he assumes all risk of personal injury, from whatever cause, while so riding free, cannot hold the carrier liable for injury resulting from negligence of the latter's agents or servants. *Id.*
6. CONTRACT OF CATTLE DEALER TO EXEMPT CARRIER FROM LIABILITY FOR NEGLIGENCE, in consideration of privilege of riding with his cattle, if he pays full fare, is void, as being without consideration, *semble*. *Id.*
7. RAILROAD COMPANY CANNOT CONTRACT FOR EXEMPTION FROM LIABILITY TO PASSENGER for damage resulting from its own willful misconduct, or that degree of recklessness which is its equivalent. *Perkins v. New York Cent. R. R. Co.*, 281.
8. RAILROAD COMPANY MAY, BY CONTRACT, EXEMPT ITSELF FROM LIABILITY TO GRATUITOUS PASSENGER, for any degree of negligence in its servants or agents, other than its directors or managing officers who are to be considered as identical with the company itself. *Id.*
9. WHETHER RAILROAD COMPANY IS LIABLE AS UPON IMPLIED GUARANTY OF SECURITY OF ITS ROAD to a gratuitous passenger contracting to exempt the company from liability for the negligence of its agents, when the injury resulted from the misconduct of a track-master in using bad material in building a bridge, not shown to have been known to the managing officers, questioned. *Smith, J., continuando*, and dissenting. *Id.*
10. COMMON CARRIER, WHO IS ALSO WAREHOUSEMAN, receiving freight to be forwarded, is presumed, in the absence of evidence to the contrary, to

receive it in his capacity as carrier, and if while awaiting transportation he stores it in his warehouse, and it is burned without his fault, he is liable for its value. *Ladue v. Griffith*, 360.

See FACTORS, 1; RAILROADS, 3, 4.

COMMON LAW.

See STATUTES, 2-4.

COMPARISON OF HANDS.

See EVIDENCE, 17, 18; WITNESSES, 7, 8.

COMPROMISE.

See EVIDENCE, 2, 3.

CONDITIONS.

See ESTATES, 7, 8.

CONFLICT OF LAWS.

See AMENDMENTS FOR BENEFIT OF CREDITORS; TRESPASS, 5.

CONSTITUTIONAL LAW.

1. RIGHT OF CITIZENS TO PROSECUTE AND DEFEND ACTIONS, AND OTHER JUDICIAL PROCEEDINGS, CANNOT BE ABROGATED or even suspended; this right being guaranteed both by section 8 of the Minnesota bill of rights, and by section 2 of article 4 of the constitution of the United States. *Davis v. Pierce*, 65.
2. ACT SUSPENDING PRIVILEGE OF PROSECUTING AND DEFENDING ACTIONS AND JUDICIAL PROCEEDINGS, as to persons aiding the rebellion against the United States, is unconstitutional and void. *Id.*
3. LEGISLATURE HAS NO AUTHORITY TO DIRECT COURTS WHAT DISPOSITION THEY SHALL MAKE OF PARTICULAR CASE or question that comes before them; and any legislative commands about such matters, other than those contained in the general law of the land, are unconstitutional and void. *Baggs's Appeal*, 583.
4. CONSTITUTIONAL PROVISION THAT ACT SHALL NOT EMBRACE MORE THAN ONE SUBJECT is not violated by including under the title "An act for a homestead exemption," provisions for the exemption of personal property. *Tuttle v. Strout*, 103.

See ADMIRALTY, 3; CRIMINAL LAW, 11; GUARDIAN AND WARD, 4; JURY AND JURORS.

CONTRACTS.

1. DESTRUCTION BY FIRE OF HOUSE WHICH WAS BEING BUILT UNDER CONTRACT will not relieve contractor from liability to an action for money advanced upon the contract, and damages for its non-performance, although at the time of the fire he had substantially performed his contract, if the house had not been completely finished and delivered. *Tompkins v. Dudley*, 349.
2. CONTRACT FOR PUBLICATION OF ADVERTISEMENT IN NEWSPAPER TO BE ISSUED AND SOLD ON SUNDAY IS VOID, under a statute which prohibits

- all servile labor or work of any kind on that day, "excepting works of necessity and charity." *Smith v. Wilcox*, 302.
3. PAROL EXTENSION OF TIME OF PERFORMANCE FIXED BY CONTRACT NOT UNDER SEAL, IS VALID. *Friess v. Rider*, 308.
 4. WHERE TIME OF PERFORMANCE FIXED BY CONTRACT IS EXTENDED, the failure of either party to attend at the time fixed discharges the other, whether he made a tender at the time and place or not, and the fact that he gives a false reason for his subsequent refusal is immaterial. *Id.*
 5. MANUFACTURERS CANNOT RECOVER CONTRACT PRICE OF REAPER, but are entitled to compensation for any actual loss or expense incurred by them in consequence of the defendant's refusal to accept a reaper, if the reapers manufactured were such as the contract of the parties called for, and the manufacturers were ready and willing to perform the contract on their part, where the plaintiffs agreed to manufacture a reaper of a certain kind, and to deliver it to the defendant at a certain time and place, and at the appointed time and place the defendant was shown the separate pieces of a number of reapers, of identical form and size, and was told that one was designed for him, and would be put up for him if he would take it, but he refused. There was not such a delivery as vested the title in the defendant. *Ganson v. Madigan*, 659.
 6. EXTRINSIC EVIDENCE OF SURROUNDING FACTS AND CIRCUMSTANCES IS ADMISSIBLE TO EXPLAIN MEANING OF WORD "TEAM," in a contract under which a reaper was to be furnished, "capable, with one man and a good team, of cutting and raking off, and laying in gavels for binding, from twelve to twenty acres of grain in a day," although the ambiguity is patent; and therefore the declarations of the agent of the manufacturers, made to the buyer at the time of entering into the contract, as to the amount of power which the machine would require, are admissible; but similar declarations, made about the same time, by the same agent, to another person, on entering into a similar contract, are inadmissible as not being a part of the *res gestæ*. *Id.*
- See DURESS; FRAUD; MASTER AND SERVANT, 3; STATUTE OF FRAUDS; SUBSCRIPTIONS.

CONVERSION.

See CO-TENANCY, 2; DAMAGES, 1.

CORPORATIONS.

1. PRIVATE CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS within the scope of their authority in the same way as any individual person is. *Pennsylvania R. R. Co. v. Vandiver*, 520.
2. COUNTY IS NOT LIABLE FOR ACTS OF ITS BOARD OF SUPERVISORS in exercise of their legislative power. *Larkin v. Saginaw Co.*, 63.
3. BOARD OF SUPERVISORS EXERCISE LEGISLATIVE POWER IN PROVIDING FOR ERECTION OF BRIDGE at the expense of the county, and the county is not liable for an injury to an individual caused by a defect in the plan of the bridge. The same rule controls in such case as would apply had the bridge been built by authority of the legislature. *Id.*
4. COMMON COUNCIL MAY IMPOSE FINES AND OTHER PECUNIARY PENALTIES, which are certain, but it has no power to enact that, where fruit is found in market in baskets not marked in a certain way, both fruit and baskets shall be forfeited. *Phillips v. Allen*, 486

1. **HOLDER OF CERTIFICATE OF STOCK MAY MAINTAIN ACTION FOR DAMAGES AGAINST ONE**, who, having assigned the certificate, causes the corporation to refuse to transfer the stock on its books by presenting to the corporation an affidavit that he had lost the certificate, and procuring a new certificate to be issued in its stead upon executing a bond "to save said company harmless from all loss or damage by reason of said second issue of stock, and from any liability on account of said certificates, and of stock described in said affidavit." *Greenleaf v. Ludington*, 698.
2. **JUDGMENT IN FAVOR OF ONE WHO CAUSES CORPORATION TO REFUSE TO TRANSFER STOCK ON ITS BOOKS** to the holder of the certificate thereof, by presenting to the corporation an affidavit in which he falsely stated that he had lost the certificate, and procuring a new certificate to be issued in its stead, upon executing a bond of indemnity to the corporation, rendered in an action for the wrongful refusal, against him and the corporation, brought by the holder of the certificate, is a bar to a second action against him, in which substantially the same facts are alleged, and he is asked to pay upon the bond of indemnity the amount of the judgment recovered in the first action against the corporation, which proved to be insolvent. *Id.*

See GAS COMPANIES; RAILROADS.

COSTS.

1. **COSTS WILL NOT BE AWARDED ON APPEAL TO EITHER PARTY**, where the point, on which the judgment appealed from is modified, was not made in the court below. *Hersey v. Board of Supervisors*, 713.
2. **RIGHT OF DEFENDANT IN EQUITY TO REQUIRE SECURITY FOR COSTS** from the complainant who is resident abroad, does not rest upon the provisions of the statute alone. It is an ancient and well-established rule that on the application of the defendant, the court will order such a complainant to give security for costs, and in the mean time will direct all proceedings to be stayed. *Newman v. Landrine*, 249.
3. **TO ENTITLE DEFENDANT IN EQUITY TO ORDER REQUIRING COMPLAINANT TO GIVE SECURITY FOR COSTS**, it is not necessary that the complainant should reside out of the state at the time of filing his bill; it will be granted if the complainant goes abroad to reside after the commencement of the suit. *Id.*
4. **DEFENDANT IN EQUITY WAIVES RIGHT TO REQUIRE SECURITY FOR COSTS FROM NON-RESIDENT COMPLAINANT**, by taking any step in the cause after notice of the non-residence. *Id.*
5. **AFFIDAVIT ON APPLICATION FOR ORDER REQUIRING COMPLAINANT IN EQUITY TO GIVE SECURITY FOR COSTS**, on the ground of his removal from the state since the commencement of the suit, must show clearly that the defendant was not aware of the removal at the time of taking the last step in the cause. *Id.*

CO-TENANCY.

1. **MINING RIGHTS OF TENANT IN COMMON, WHEN DENIED BY ALLEGED CO-TENANT**, can be established at law only. Equity has no jurisdiction in such a case. *North Penn. Coal Co. v. Snowden*, 530.
2. **WHERE ONE OF TWO TENANTS IN COMMON OF QUANTITY OF "SHOT-IRON" TAKES POSSESSION OF ALL IRON**, mixes it with other iron, manufactures the mixture into various iron wares, so that the common property can be

no longer traced or identified, and afterwards sells or disposes of these wares, these acts amount to a conversion of the share of his co-tenant. *Redington v. Chase*, 189.

3. TENANT IN COMMON IS NOT GUILTY OF TRESPASS against his co-tenant in putting his co-tenant's tenant out of possession of buildings which he, the ejector, had built and occupied, but which had become casually vacant. *Wilbert v. Hoff*, 493.
4. MERE DENIAL OF CO-TENANT'S TITLE IS NOT TRESPASS upon his possession, nor equivalent to an ouster. *Id.*
5. TENANT IN COMMON CANNOT MAINTAIN TRESPASS AGAINST HIS CO-TENANT for cutting and carrying away timber, where no ouster is proved. *Id.*
6. WHEN TENANT IN COMMON BRINGS EJECTMENT against his co-tenant, who sets up an adverse holding "against all persons," it is unnecessary for the plaintiff to show a previous demand for possession. *Harrison v. Taylor*, 189.

See GROWING TREES, 2, 3.

COUNTERCLAIM.

See SALES, 11, 12.

COVENANTS.

BURDEN OF PROOF IN ACTION FOR BREACH OF COVENANT OF SURETY is upon the defendant who answers that he was well seized, etc. *Meeklen v. Blake*, 707.

See ESTATES, 1, 2; PARTNERSHIP, 4.

CRIMINAL LAW.

1. PROSECUTION MUST IDENTIFY STOLEN PROPERTY found in the possession of the accused, with that for the theft of which he is indicted, and this must be done by the most direct and positive testimony of which the case is susceptible. *Garcia v. State*, 605.
2. INDICTMENT UNDER ARTICLE 765, PENAL CODE of Texas, charging theft, must allege the possession from which the stolen property was taken. *Id.*
3. TAKING PROPERTY WITHOUT CONSENT OF OWNER is an essential ingredient of theft; unless this is proved, it cannot be inferred that larceny has been committed. *Id.*
4. POSSESSION OF PROPERTY IS PRESUMPTIVE EVIDENCE of the guilt of the possessor, especially if held soon after the commission of the theft. But the mere possession of property is not evidence of its caption and asportation without the owner's consent. *Id.*
5. ONUS OF PROVING TRUTH OF HIS EXPLANATION is upon party in whose possession stolen property is found, when his account, explanatory of such possession, is unreasonable or improbable; but as a general principle, it devolves upon the state to show the falsity of such explanation when it is natural and probable, and satisfactorily accounts for such possession. *Id.*
6. MARRIAGE, TO SUPPORT INDICTMENT FOR BIGAMY, IS SUFFICIENT, if the parties agree to be husband and wife, and cohabit and recognize each other as such. And it is immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived by his false representation of that character. *Hayes v. People*, 364.

7. ON INDICTMENT FOR BIGAMY, PROOF OF MANNER OF INTERCOURSE between defendant and his wife, subsequent to the contract of marriage, is admissible in corroboration of prosecutrix's testimony as to the actual marriage. *Id.*
8. EVIDENCE OF AGREEMENT FOR SEXUAL INTERCOURSE WITH THIRD PERSON, made by prosecutrix on the day of the commission of a rape upon her, is inadmissible on the trial of an indictment for the rape. *McDermott v. State*, 444.
9. GENERAL CHARACTER OF PROSECUTRIX FOR CHASTITY IS IN ISSUE IN PROSECUTIONS FOR RAPE, but particular acts of lewdness with persons other than the accused cannot be proved on the trial: First, because she is presumed to be unprepared to disprove such specific accusations without previous notice; and secondly, because it would create collateral issues, indecisive of the guilt or innocence of the accused, but well calculated to embarrass and mislead the jury. *Id.*
10. ALLUSIONS TO SPECIFIC REPORTS OF IMPROPER INTIMACY OF PROSECUTRIX WITH THIRD PERSONS, made on a trial for rape by the witnesses of the accused, without objection from the prosecution, do not authorize the prosecution to introduce evidence contradicting the truth of such reports. The issue is not whether a bad reputation of the prosecutrix for chastity is deserved, but whether it is generally accredited. *Id.*
11. ACT SHORTENING CONVICT'S TERM OF IMPRISONMENT BY GIVING CREDITS for good conduct, is unconstitutional as interfering with the judgments of the judiciary. *Commonwealth v. Holloway*, 526.
12. COURT WILL NOT CONTROL DISCRETION OF PRISON INSPECTORS, and compel them to discharge prisoners, even though they have served periods which, together with their credits for good conduct, entitle them to release under the law. *Id.*

See FORFEITURE.

DAMAGES.

1. MEASURE OF DAMAGES IN ACTION FOR CONVERSION OF GRAIN is the market value of ordinary merchantable grain of the kind alleged to have been converted. *Griswold v. Haven*, 380.
2. THERE IS NO ROOM FOR VINDICTIVE DAMAGES, where the injury was not willful. *Heil v. Glanding*, 537.
3. DETERMINATION OF DAMAGES IN ACTION OF TORT SHOULD NOT BE LEFT ABSOLUTELY TO JURY. Actual compensation is all the injured party can claim, if the injury was not willful. *Id.*
4. WHERE JURY GIVES MORE THAN NOMINAL DAMAGES, all instructions given in reference to nominal damages become immaterial, because no state of facts arose to which such instructions could apply. And the same is true in relation to instructions sought upon the assumption that no actual damage was done. *Eastman v. Amoskeag Mfg. Co.*, 201.

See ASSAULT AND BATTERY; CORPORATIONS, 5; EJECTMENT, 6; EXEMPTIONS, 3, 4; GAS COMPANIES, 2-4; HIGHWAYS; MASTER AND SERVANT, 3; OFFICE AND OFFICERS, 2; RECAPTION, 3; SALES, 8-12; SLANDER, 1, 3; TRESPASS, 2.

DEEDS.

See ESTATES; FRAUDULENT CONVEYANCES; MARRIED WOMEN; MORTGAGES; PARENT AND CHILD; TAXATION, 5, 6; VENDOR AND VENDEE, 2; WITNESSES, 4.

DEPOSITIONS.

See EVIDENCE, 7, 10; WITNESSES, 3.

DIVORCE.

See MARRIAGE AND DIVORCE.

DURESS.

1. **DURESS.** — As between parties occupying no relation of confidence, or of control by reason of position, employment, or undue influence, can rarely be imputed, without showing some degree of fear or threats, involving in some degree a species of fraud. But when these latter elements enter into it, courts of equity have long been accustomed to grant relief. *Madie v. Stimson*, 395.
2. **DURESS.** — ASSIGNMENT PROCURED FROM WOMAN by threatening to arrest her husband and prosecute him, in case she refused to execute it, is void, as such threats amount to undue influence. *Id.*
3. **WHERE WOMAN'S FEARS ARE SO BROUGHT UPON THAT SHE EXECUTES AGREEMENT TO MAKE ASSIGNMENT**, and several hours after executes the assignment, she will be considered as still acting under the same influence, apprehensions, and fears as influenced her in making the first agreement. *Id.*

EASEMENTS.

1. **EASEMENT ACQUIRED BY PRESCRIPTION IS RESTRICTED** to the extent of the user. *Wright v. Moore*, 731.
2. **LAND-OWNER HAS NOT ABSOLUTE AND UNQUALIFIED RIGHT** to the unaltered natural drainage or percolation to or from his neighbor's land. *Bassett v. Salisbury Mfg. Co.*, 179.
3. **ADVERSE ENJOYMENT, FOR TEN YEARS**, of the privilege of damming up the water of a stream so as to raise the level without overflowing the banks, is sufficient, in Alabama, to create the presumption of a right, which a court of equity will protect. *Wright v. Moore*, 731.

See WAYS.

EJECTMENT.

1. **EJECTMENT MUST BE BROUGHT AGAINST ACTUAL OCCUPANT OF PREMISES**, if there be one, and if the occupant be a tenant of another, the landlord may appear and defend in his name, or be substituted in his place. *Dutton v. Warschauer*, 765.
2. **APPEARANCE OR SUBSTITUTION OF LANDLORD IN ACTION OF EJECTMENT** should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant cannot, to the prejudice of the landlord, interfere with any of the subsequent proceedings. *Id.*
3. **RIGHT OF LANDLORD TO CONDUCT PROCEEDINGS IN EJECTMENT**, after having been once allowed to appear in the tenant's name, extends to the final disposition of the case, and is not limited to the proceedings in the lower court. *Id.*
4. **WHERE LANDLORD, AT REQUEST OF TENANT, APPEARS IN ACTION OF EJECTMENT**, without any order of record, and conducts the defense to judgment in the lower court, it will be too late to object in the appellate court for the want of such order. *Id.*
5. **DEFENDANT IN EJECTMENT IS NOT RELEASED FROM LIABILITY FOR USE AND OCCUPATION** because he is a mere tenant of another, and has paid

- rent to him. The plaintiff must look to the occupant of the premises for compensation for their use, and the occupant's recourse, in such case, is upon his landlord. *Keane v. Cannon*, 738.
8. **VALUE OF IMPROVEMENTS CANNOT BE SET OFF AGAINST DAMAGES** in ejectment, where no foundation is laid in the allegations of the answer for any proof on the subject. *Id.*
 9. **CONVEYANCE TO PLAINTIFF IN EJECTMENT, WHO RELIES ON PRIOR POSSESSION** as evidence of title, is admissible in evidence, in connection with proof of entry and occupation under it, for the purpose of showing the extent and boundaries of the premises of which he claimed possession, although no title is shown in the grantor at the time of the execution of such conveyance. *Id.*
 10. **TAX DEED IS NOT ADMISSIBLE AS EVIDENCE OF TITLE WITHOUT PROOF** that all the requirements of the law authorizing its execution have been complied with. *Id.*
 11. **STATUTE MAKING TAX DEED PRIMA FACIE EVIDENCE OF TRANSFER OF TITLE** of the delinquent can apply only to deeds executed upon a sale for taxes levied subsequent to its enactment. *Id.*
 12. **ALLEGATIONS IN COMPLAINT IN FORMER ACTION, BROUGHT BY PLAINTIFF** against his agent to recover damages for permitting premises to be sold for taxes, that by reason of the neglect of the agent the premises were sold and redemption was not made; that the sale thereby became absolute, and that in consequence he sustained damages, — are not admissible in evidence, in an action of ejectment, as an admission of title in the purchaser at the tax sale; nor, even if they amounted to an admission, would they operate to transfer such title. *Id.*
 13. **IN ACTION OF EJECTMENT, WHERE DEFENDANT CLAIMS TITLE THROUGH PURCHASE MADE AT SALE** under a power contained in a mortgage, an instruction in these words is erroneous: "If the jury believe from the evidence that M. B. McKinney, the mortgagee mentioned in the mortgage made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser, but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, then the sale was void." *Blockley v. Fowler*, 747.

See CO-TENANCY, 6; POSSESSION, 2.

ENTICEMENT.

1. **IN ACTION BY HUSBAND FOR DAMAGES FOR ENTICING AWAY HIS WIFE**, he may give in evidence the declarations of his wife made shortly prior to the alleged seduction, in order to show the state of her feelings towards him at that time, whether the declarations were made before or after her marriage with the plaintiff; but it is erroneous to admit on this ground declarations of the wife concerning the words and acts of the defendant, and tending to prove the charges against him, as such evidence is merely hearsay. *Preston v. Bowers*, 430.
2. **DECLARATIONS OF PERSON NOT DEFENDANT IN ACTION FOR ENTICING AWAY PLAINTIFF'S WIFE**, but charged in the petition as having conspired with the defendants for that purpose, are admissible, in the first instance, to show his connection with the conspiracy, but they are not evidence against

the defendants, and the jury must be instructed to disregard them, unless, in the first place, the conspiracy is proved to the satisfaction of the jury, and unless, secondly, the declarations were made in furtherance of the common design. *Id.*

EQUITABLE ASSIGNMENT.

See FACTORS, 2.

EQUITY.

1. EQUITY HAVING OBTAINED JURISDICTION OF PARTIES AND SUBJECT-MATTER should retain the cause and do complete justice between the parties, in order to avoid a multiplicity of suits. *Bomberger v. Turner*, 438.
2. CLERK AND MASTER IN CHANCERY IS NOT PARTY TO SUIT SO AS TO ENTITLE HIM TO APPEAL from an interlocutory order appointing another than himself a commissioner to sell real estate, within the meaning of the North Carolina Revised Code, c. 4, sec. 23, which allows an appeal "at the instance of the party dissatisfied." *Green v. Harrison*, 415.
3. AMENDMENTS ARE ALLOWED IN EQUITY WITH GREAT LIBERALITY. *Codington v. Mott*, 258.
4. FORMAL AMENDMENTS AS INTRODUCTION OF NECESSARY PARTIES, and amendments in the prayer of the bill to meet the exigency of the case, will be made up to and after the final hearing. *Id.*
5. MATERIAL AMENDMENTS IN EQUITY, AS GENERAL RULE, SHOULD BE APPLIED FOR AND MADE before the cause is at issue. *Id.*
6. AMENDMENT SEEKING TO MAKE NEW CASE inconsistent with that made by original bill, if permissible at all, must be made before the cause is at issue, and before a sworn answer has been filed. *Id.*
7. APPLICATION TO AMEND BILL FOR SPECIFIC PERFORMANCE OF CONTRACT by charging the contract to be fraudulent, and praying that it be declared void, will not be granted after the cause is at issue, and the time limited to close testimony has expired. *Id.*
8. PROPER PRACTICE WHERE COMPLAINANT HAS MISTAKEN HIS CASE is to dismiss the bill without prejudice to a new bill. *Id.*
9. APPLICATION TO AMEND BILL SHOULD BE PROMPTLY MADE after the discovery of the facts upon which it is based. *Id.*
10. ANSWER THAT DEFENDANT "DOES NOT ADMIT" MATERIAL AVERTMENT OF PETITION does not put plaintiff upon proof of its truth. *Bomberger v. Turner*, 438.
11. AVERTMENT OF ISSUANCE OF EXECUTION AND RETURN OF NO PROPERTY, etc., is not necessary in a petition by a judgment creditor, under the Ohio code, to set aside a fraudulent deed and subject the land to the payment of his judgment if the fact of no property is averred. The fact of no property in the judgment debtor, and not the return upon execution, is made the basis of the action. *Id.*
12. HEIRS OF FRAUDULENT GRANTEE OF LAND WHO HAVE INNOCENTLY MADE IMPROVEMENTS while in possession, and paid the taxes for several years, are entitled to compensation for their expenditures in a suit in equity by a creditor of the grantor, to subject the land to the payment of his judgment, against the grantor; and an answer setting out such expenditures, and asking, in case the deed be set aside, for the ascertainment of the amount thereof, and its payment out of the proceeds of the sale, is good on demurrer. *Id.*

13. DECREE DIRECTING LOT TO BE APPRAISED AND SOLD FREE FROM IMPROVEMENTS made thereon by the defendants, and saving the right of the defendants under the occupying claimant law, in a suit in equity to subject the lot to the payment of a third person in which the defendants are entitled to the value of their improvements, is erroneous, since the defendants are entitled to that relief in that action. *Id.*
 14. EQUITY HAS JURISDICTION TO DECREE QUIET ENJOYMENT OF LAND ALLOTTED UNDER PAROL PARTITION BETWEEN JOINT OWNERS, after a long acquiescence and possession thereunder. *Kennedy v. Kennedy*, 574.
 15. EQUITY WILL NOT DECREE QUIET ENJOYMENT OF LAND ALLOTTED UNDER PAROL PARTITION, unless the partition is complete. A decree will not be granted, therefore, where a division line was run, but the owelty of partition contemplated was not adjusted and paid. *Id.*
- See ATTACHMENT, 2; ATTORNEY AND CLIENT; BONA FIDE PURCHASERS; COSTS; CO-TENANCY, 1; DURESS; FRAUD; JUDGMENTS, 1, 8; JURISDICTION, 3; JURY AND JURORS; TRUSTS.

ESTATES.

1. COVENANT WARRANTING LAND TO GRANTEE AND HIS HEIRS CANNOT ENLARGE ESTATE, nor pass by estoppel a greater estate than that expressly conveyed. *Adams v. Ross*, 287.
2. COVENANT OF WARRANTY ATTACHES ONLY TO ESTATE GRANTED, or purported to be granted. If a life estate only is expressly conveyed, the covenantor warrants nothing more; the conveyance is the principal, and the covenant the incident. *Id.*
3. GRANTEE MUST EXPRESS HIS INTENT AS TO ESTATE GRANTED BY USE OF NECESSARY WORDS OF CONVEYANCE. In construing a deed, the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention, will supply the omission. *Id.*
4. WORD "HEIRS" IS NECESSARY TO CREATE ESTATE IN FEE-SIMPLE. *Id.*
5. WORDS OF PROCREATION, AS WELL AS OF INHERITANCE, ARE NECESSARY TO CREATE ESTATE-TAIL. *Id.*
6. GRANTEE TAKES ESTATE FOR LIFE, WITH VESTED REMAINDER FOR LIFE TO CHILD OF MARRIAGE, born after the conveyance, subject to open and let in after-born children, by a deed in which the grantor, in consideration of love and affection, and of one dollar, grants, bargains, sells, aliens, remises, releases, and confirms certain lands to the grantee, for and during her natural life, and at her death to her children which may be begotten of her present husband, with a covenant of warranty, among others, made by the grantor for herself and her heirs with the grantee, her heirs and assigns; and the husband of the grantee is not entitled to curtesy in the lands on surviving his wife. *Id.*
7. CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, and are construed strictly, because they tend to destroy estates. *Emerson v. Simpson*, 163.
8. ESTATE UPON CONDITION IN DEED that the grantee shall forever keep up and maintain a fence on the line between the land conveyed and other land specified, is not forfeited by neglect to keep up the fence after the grantee's death. *Id.*

ESTATES FOR LIFE.

See ESTATES, 2, 6.

ESTATES OF DECEDENTS.

1. DUTY OF ADMINISTRATRIX AS TO BODY OF DEAD TERMINATES with the burial. *Wynkoop v. Wynkoop*, 506.
2. WIDOW HAS NO RIGHT TO OR CONTROL OVER BODY OF HER DECEASED HUSBAND after the interment. *Id.*
3. DISPOSITION OF REMAINS OF DECEASED PERSON AFTER BURIAL belongs thereafter exclusively to his next of kin. *Id.*
4. COURT WILL NOT GIVE WIDOW PERMISSION TO REMOVE BODY OF HER HUSBAND from his mother's burial-place in consecrated ground, against the consent of the husband's mother, she being the next of kin of decedent, and especially where the son was buried with the ceremonies of the church, and the honors of war. *Id.*

See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTATES-TAIL.

See ESTATES, 5. 6.

ESTOPPEL.

See ESTATES, 1; FRAUD, 5; INSURANCE, 7; MORTGAGES, 9; VENDOR AND VENUE, 2.

EVIDENCE.

1. FOREIGN COUNTRY—JUDICIAL NOTICE.—Courts will take judicial notice that the province of Upper Canada is a foreign country; that it forms no part of our own; that it has a government and courts; and that these courts proceed according to the course of the common law. *Lanier v. Westcott*, 404.
2. STATE WILL TAKE JUDICIAL NOTICE OF ITS OWN LAWS ONLY, and those enacted by the federal government. *Brimhall v. Van Campen*, 118.
3. LAWS OF SISTER STATES ARE FACTS TO BE PROVED. *Id.*
4. COURTS OF ONE STATE WILL PRESUME THAT LAWS OF OTHER STATES are like their own, in the absence of proof to the contrary. *Id.*
5. WHERE PART OF CONVERSATION HAS BEEN GIVEN IN EVIDENCE, any other or further part thereof may be admitted in reply which would in any way explain or qualify the part first given. Thus where the plaintiff, to show that his property had been applied to the defendant's use in payment of a note made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff and declared that it was plaintiff's, it was held that the defendant was entitled to prove his statement in the same conversation that the note was the plaintiff's debt, and he was to pay it. *Rouse v. Whited*, 337.
6. EVIDENCE IN REBUTTAL IS ADMISSIBLE, ON DEFENDANT'S PART, to the effect that on a former hearing of the case, a witness for the plaintiff, to prove the genuineness of a paper, testified that she saw the defendant sign it, where the witness on the present hearing testifies in what room he signed it, and that "he stood by the secretary, and stooped over to sign it," without expressly stating that he was seen to sign it, because if there is an essential contradiction the defendant is entitled to the benefit of it, and if there is none, the plaintiff is not injured. *Travis v. Brown*, 540.
7. DEPOSITIONS SHOULD NOT BE PERMITTED TO BE READ IN EVIDENCE, where no rule was entered for taking them, as required by the rules of court. *Id.*

8. OBJECTIONS CANNOT BE URGED IN SUPREME COURT TO DEPOSITION for the want of sufficient notice, and of a proper certificate by the magistrate, when the objections were not made in the court below. *Cameron v. Cameron*, 652.
9. OBJECTION TO DEPOSITION FOR WANT OF SUFFICIENT NOTICE IS WAIVED by cross-examination. *Id.*
10. DEPOSITION OF CONTENTS OF LETTERS IS INADMISSIBLE without proof accounting for their absence, nor evidence showing any effort to produce them. *Farwell v. Brennan*, 137.
11. AFFIDAVIT NOT TAKEN PURSUANT TO RULE OF COURT will be excluded as incompetent evidence. *Newman v. Landrine*, 249.
12. QUESTION IS PROPERLY EXCLUDED WHEN ANSWER TO IT COULD NOT HAVE BEEN MATERIAL. *Eastman v. Amesbag Mfg. Co.*, 201.
13. ADMISSION OF TESTIMONY WHICH IS INCOMPETENT AS CASE THEN STANDS, but which is afterwards made competent by the introduction of other evidence, is not a ground for setting aside the verdict. *Id.*
14. ENDORSEMENTS ON WRITTEN INSTRUMENTS ARE INDEPENDENT WRITINGS, and can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form. *Turrell v. Morgan*, 101.
15. EVIDENCE TO IMPEACH STIPULATION IN POSSESSION OF ADVERSE PARTY OUGHT TO BE AS CLEAR AND UNEQUIVOCAL as that required to establish mistakes in such instruments, and the rule is, that mistakes therein must be established beyond a reasonable doubt. *Cameron v. Cameron*, 652.
16. SLIGHT SECONDARY EVIDENCE OF CONTENTS OF PAPER IS SUFFICIENT against a party who has the power to remove all doubts by producing the original, but refuses to do so after proper notice. *Eastman v. Amesbag Mfg. Co.*, 201.
17. EVIDENCE OF GENUINENESS OF PAPER IN SUIT MAY BE CORROBORATED BY COMPARISON, to be made by the jury, between that paper and other well-authenticated writings of the same party. *Travis v. Brown*, 540.
18. TEST DOCUMENTS, TO BE USED IN COMPARISON OF HANDWRITING, SHOULD BE ESTABLISHED BY MOST SATISFACTORY EVIDENCE before being admitted to the jury. *Id.*
19. CONSTRUCTION OF WRITTEN INSTRUMENT IS USUALLY FOR JURY, if its meaning is to be judged by extrinsic evidence. *Ganson v. Madigan*, 659.
20. PAROL EVIDENCE IS INADMISSIBLE to vary or contradict the terms of a written contract. *Arnold v. Jones*, 617.
21. PAROL EVIDENCE IS ADMISSIBLE ON PART OF ONE PARTY TO WRITTEN AGREEMENT, when it shows that the relations of the parties were specially confidential, that the plaintiff had great confidence in the defendant, and relied upon his advice, and was likely to be guided by it. *Malory v. Leach*, 625.
22. SITUATION OF PARTIES AND NATURE AND OBJECT OF THEIR TRANSACTIONS MAY BE LOOKED AT IN CONSTRUCTION OF WRITTEN INSTRUMENT; but the court cannot look outside of the instrument to get at the intention of the parties, and then carry out that intention, whether the instrument contains language sufficient to express it or not. *Farmers' L. & T. Co. v. Commercial Bank*, 689.
23. ADMISSION OF INDEPENDENT FACT, MADE DURING NEGOTIATIONS FOR COMPROMISE OF CONTROVERSY, is admissible in evidence against the party making it. And the fact thus admitted need not be independent of the subject-matter of the controversy, provided it be a distinct admis-

sion of a fact, as distinguished from an offer to buy peace, or compromise a controversy. *Eastman v. Amoskeag Mfg. Co.*, 201.

See AUTHENTICATION OF INSTRUMENTS; CONTRACTS, 6; CRIMINAL LAW, 4, 5, 8-10; EJECTMENT, 7-9; ENTICEMENT, 2; FORFEITURE; FRAUD, 1; MORTGAGES, 11; NEGOTIABLE INSTRUMENTS, 1, 2; OFFICE AND OFFICERS, 2, 10; PLEADING AND PRACTICE, 8-12; POSSESSION, 3; SALES, 3, 7, 9; SLANDER, 2, 3; TAXATION, 6-8; VENDOR AND VENDEE, 2; WILLS, 1; WITNESSES.

EXECUTIONS.

1. JUDGMENT IS NOT SATISFIED BY LEVY OF EXECUTION upon property of the defendant, if the same is afterwards restored to his possession. *Young v. Cleveland*, 155.
 2. PURCHASER AT EXECUTION SALE OF LAND held under a trust deed containing a stipulation that ten days' notice of sale should be given, becomes the owner of the equity of redemption, and possessed of the same rights that the maker of the trust deed retained at the time of its execution. He becomes the owner of the land subject to the lien of the debt due on the trust deed; and if the required notice of sale is given, he has a right to redeem at any time before the sale. If notice of sale is waived by the parties to the trust deed, and a sale made immediately, he cannot be thereby defeated of his right to redeem. *James v. Jacques*, 613.
 3. EXECUTION SALE OF ENTIRE STOCK IN LUMBER AND COAL YARD IS VOID, WHEN MADE EN MASSE, by direction of the attorney of the plaintiffs in execution, to the plaintiffs, whose bid was the only one made, if there were no circumstances to justify a departure from the rule that a sheriff must sell separately or in parcels. *Klopp v. Witmoyer*, 561.
 4. EXECUTION SALE OF PERSONAL PROPERTY IS NOT VOID BECAUSE PART OF PROPERTY WAS SOME DISTANCE FROM PLACE OF SALE. Although such property must be in the power of the sheriff when he sells, and where bidders may inspect it, a sale is not necessarily void because the articles are not immediately in view when sold. *Id.*
 5. PURCHASER OF PROPERTY FROM DEBTOR AT PRIVATE SALE, SUBJECT TO LIEN OF EXECUTION, HAS NO EQUITY TO REQUIRE SHERIFF TO SELL other property remaining, sufficient to satisfy the execution. *Beebe v. Landis*, 418.
- See EXEMPTIONS; HOMESTEADS; INSURANCE, 4, 5; STATUTES, 6; SURETSHIP, 2.

EXECUTORS AND ADMINISTRATORS.

1. COURT OF PROBATE HAS POWER, INDEPENDENT OF STATUTE, TO REVOKE LETTERS TESTAMENTARY or of administration, where they have been issued without jurisdiction, irregularly or illegally, or for a special cause which has ceased to exist. *Morgan v. Dodge*, 213.
2. ADMINISTRATION OF ESTATE IS SUSPENDED UNTIL PERSON APPOINTED EXECUTOR FILES PROPER BOND, and the claims of creditors are not barred by failure to present them, or to commence suit upon them, while such suspension continues. *Id.*
3. WHERE RESIDUARY LEGACY IS OF PERSONAL PROPERTY ONLY, and it appears that there is no other property undisposed of, a bond may be given by the executor to pay debts and legacies; and in such a case, extrinsic evidence of the condition of the estate may be received in order to determine whether or not the legacy is residuary. *Id.*

4. APPLICATION OF WIDOW FOR LETTERS TESTAMENTARY IS SUFFICIENT WRITING to inform the judge of her acceptance of the will, if nothing in it indicate the contrary. *Id.*
5. STATUTE REQUIRING ADMINISTRATOR'S BOND TO BE "APPROVED" BY COUNTY JUDGE IS DIRECTORY MERELY, and the granting of letters without such approval in form is at most but an irregularity, which can only be taken advantage of by appeal from the order. *Cameron v. Cameron*, 652.
6. ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO AND HIS SURETIES ARE LIABLE ON THEIR BOND to the parties interested in the estate, although the administrator be improperly appointed. *Shaller and Welling's Appeal*, 552.
7. ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO AND HIS SURETIES ARE LIABLE ON THEIR BOND for the proceeds of real estate sold by the administrator, as directed by the will, for which he failed to account, although the bond is in the form of an original administration bond in cases of intestacy. *Id.*
8. SALE OF REAL ESTATE BY ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO, AFTER EXPIRATION OF YEAR, IS AS EFFECTUAL as if made by the executors, who had the power to sell, under a will which directed a sale by the executors "so that it be within one year" after the death of the testator. The provision is only directory, and not a condition precedent. *Id.*
9. ADMINISTRATOR MAY, AS GENERAL RULE, SUBMIT CLAIMS AGAINST ESTATE to award of arbitrators. *Crum v. Moore's Adm'r*, 262.
10. EQUITY WILL ENJOIN ADMINISTRATOR FROM SUBMITTING CLAIM AGAINST ESTATE TO ARBITRATION, without the consent and against the interest of the parties interested, where the estate is virtually settled, and he occupies the attitude of a trustee of a fund claimed by two contending parties. *Id.*
11. COURT WOULD RELUCTANTLY INTERFERE WITH DISCRETION OF ADMINISTRATOR TO REFER CONTROVERSY TO ARBITRATION in the ordinary course of administration, where the rights of various parties are involved. *Id.*
12. ADMINISTRATOR WHO SUBMITS CLAIM AGAINST ESTATE TO ARBITRATION IS BOUND by the award, and may enforce performance against the other party. *Id.*
13. PARTIES INTERESTED IN ESTATE ARE NOT BOUND BY ADMINISTRATOR'S SUBMISSION TO ARBITRATION of claims against the estate; and if, upon the submission of a debt due the estate, the arbitrators award less than is really due, the administrator shall answer for the full amount of the debt. It amounts to a *devastavit* by the administrator to the extent of the loss. *Id.*
14. ADMINISTRATOR WILL BE ENJOINED FROM SUBMITTING TO ARBITRATION the claim of one heir against the estate without the consent of the other heir, where it is peculiarly proper, from the nature of the claim, that it should be submitted to a court for determination, and where the administrator has assumed an attitude hostile to the interests of the complaining heir. *Id.*
15. PERSONAL LIABILITY OF ADMINISTRATOR TO CESTUI QUE TRUST, IN CASE OF INCORRECT AWARD, cannot be urged by him in defense to an application by the *cestui que trust* for an injunction restraining him from making a submission to arbitration, for such an award may, and in many cases must, operate to the prejudice of the *cestui que trust*. *Id.*

16. INVENTORY IS NOT CONCLUSIVE FOR OR AGAINST ADMINISTRATOR, but is open to denial or explanation. *Cameron v. Cameron*, 652.
17. BILL OF REVIEW WILL NOT LIE ON ADMINISTRATOR'S ACCOUNT, in Pennsylvania, finally settled eleven years before by a decree of the court, because barred by the act of October 13, 1840, requiring bills of review to be brought within five years after the final decree, and because the claim to a distributive share asserted therein was not presented within seven years after the intestate's death, as required by the act of April 8, 1833. *Baggs's Appeal*, 583.
18. ACT OF LEGISLATURE IS UNCONSTITUTIONAL AND VOID IF IT DIRECTS ORPHANS' COURT TO GRANT REVIEW OF ADMINISTRATOR'S ACCOUNT and of the decree of distribution of an estate, on the petition of any party interested, with the same effect as if application had been made within five years after the decree, as required by a general statute, when the act was passed nearly twelve years after the distribution of the decedent's estate, and the final decree thereon. *Id.*
19. ESTATE IS NOT CHARGEABLE WITH EXPENSES OF ADMINISTRATRIX IN SUIT BROUGHT BY HER in her individual capacity for the purpose of establishing the right of the intestate to lands, in order that she might have dower therein as his widow. *Cameron v. Cameron*, 652.
20. ESTATE IS NOT CHARGEABLE WITH EXPENSES OF ADMINISTRATRIX IN DEFENDING SUIT BROUGHT AGAINST HER by the heir to remove her from the administration, on the ground that she obtained the appointment by a fraudulent representation that she was the widow of the intestate, and which suit was compromised, upon her concession that she had no right to the estate, and would resign her office. *Id.*
21. ESTATE IS NOT CHARGEABLE WITH EXPENSES AND SERVICES OF CO-ADMINISTRATOR IN SUIT in which he made no defense, and where it was a matter of no interest to him, as administrator, whether the suit was successful or not. *Id.*
22. ADMINISTRATOR'S ACCOUNT NEED NOT BE MADE UP IN ITEMS of days and half-days spent in performing services. If the time actually devoted to the affairs of the estate be clearly proved, that will be sufficient. *Id.*
23. ADMINISTRATOR IS NOT ACCOUNTABLE TO ESTATE FOR RENTS RECEIVED BY HIM FROM LANDS which did not belong to the decedent, but which were improperly included in the inventory and appraisement. *Id.*

See ESTATES OF DECEDENTS; WILLS.

EXEMPTIONS.

1. LAW EXEMPTING PROPERTY FROM EXECUTION IS UNCONSTITUTIONAL AND VOID under the Minnesota bill of rights, if it excepts from the exemption provided, debts or liabilities for wages due to clerks, laborers, or mechanics. *Tuttle v. Strout*, 108.
2. UNDER STATUTE EXEMPTING TOOLS OF TRADE FROM EXECUTION, MACHINE FOR SPLITTING LEATHER, operated either by steam, water, or hand power, and which, when run by hand, required the power of two men, and which cost \$250, weighed between six and nine hundred pounds, had two knives and two rollers, was operated by a crank, and when running required to be fastened to the floor by cleats, and was movable from place to place in the shop, is not exempt. *Henry v. Sheldon*, 644.
3. IN ACTIONS FOR DAMAGES FOR WRONGFUL LEVY ON PROPERTY EXEMPT BY LAW, a selection of and demand for the property as exempt, and refusal

by the officer, need not be proved by plaintiff to entitle him to recover, in a case where the property levied on is a separate and distinct article expressly exempted by statute, nor in any case, except where the exempt property is mingled with other of the same kind not exempt, or where the debtor's property is so situated that the officer cannot know that it is exempt. *Lynd v. Pickett*, 79.

4. **FACT ALLEGED AND PROVED, THAT OFFICER SEIZED ON PROCESS** property which he knew to be exempt, may be considered by the jury in aggravation of damages in an action for the wrongful levy. *Id.*
5. **MALICE IN LEVY ON PROPERTY EXEMPT BY LAW** is as fully expressed by a taking with knowledge that the property is so exempt as it would be by a refusal to deliver the property after it had been demanded as exempt. *Id.*
6. **DEMAND FOR EXEMPT PROPERTY SEIZED ON PROCESS**, when necessary in order to enable the plaintiff to recover, need not be made at the time of the seizure by the officer, but should be made within a reasonable time, which must depend upon the circumstances of each particular case. *Id.*

See CONSTITUTIONAL LAW; HOMESTEADS.

EXPERTS.

See WITNESSES, 8.

FACTORS.

1. **FORWARDING MERCHANTS ARE BOUND** to give advice to the consignee of the shipment made to him, and the liability of the carrier to deliver according to the bill of lading does not discharge them, although they may have been prevented from getting bills of lading in triplicate by the misconduct of such carrier. *Railey v. Porter*, 141.
2. **DRAFT BY CONSIGNOR ON HIS CONSIGNEE FOR SUM PAYABLE TO THIRD PERSON** out of proceeds of goods when the same should be sold, is a specific appropriation to the use of the latter, and binds the consignee to retain so much of the proceeds as is necessary to meet the draft; and the obligation of the consignee to the payee is not discharged by failure of the payee to present the draft for payment for several months, and an agreement in the mean time between the consignor and consignee for a new appropriation of the fund for the benefit of the latter. *Lowery v. Steward*, 346.

FENCES.

See RAILROADS, 2-5.

FIXTURES.

1. **STEAM-ENGINE AND BOILERS WHICH FURNISH MOTIVE POWER TO MARBLE-WORKS, AND WHICH ARE ATTACHED** to the realty by brick-work, granite, masonry, and bolts, are fixtures, and will be regarded as part of the freehold. *Sweetser v. Jones*, 639.
2. **WHERE STEAM-ENGINE AND BOILER, ATTACHED TO FREEHOLD**, furnish the motive power for mill machinery which can be readily moved without injuring the mill, this latter circumstance does not change the character of the engine and boiler as fixtures. *Id.*
3. **NOT FIXTURES.** — Saw-frames in a marble-mill, attached at the top and bottom with bolts, and used for steadying the saws, are not fixtures. *Id.*

4. ROLLS CAST FOR ROLLING-MILL DO NOT PASS AS REALTY TO PURCHASERS, where they were paid for and delivered at the mill, but lay beside it, without being turned or finished off, or put into the mill. *Johnson v. Mahaffey*, 568.

See TRADE-MARKS, 2.

FOREIGN LAWS.

See EVIDENCE, 1-4.

FOREIGN RECORDS.

See AUTHENTICATION OF INSTRUMENTS.

FORFEITURES.

- IN SUITS TO RECOVER FORFEITURE, RULE OF EVIDENCE IN CRIMINAL CASES APPLIES, that all the facts material to sustain the suit must be proved beyond a reasonable doubt. *Ritter v. Hooper*, 646.

See ANIMALS, 10, 11; JUDGMENTS, 7.

FORGERY.

See WITNESSES, 8.

FRANCHISES.

See RAILROADS, 1, 2.

FRAUD.

1. FRAUD IS NEVER PRESUMED; and where it is alleged, the facts sustaining it must be clearly made out. Where, therefore, it is simply shown that a person acted as agent in procuring a note and mortgage, and in receiving interest upon the note, the court will not infer from this that his duties as agent were of such a character as to prevent him from contracting in relation to the property on which the debt was secured. *McCarthy v. White*, 754.
2. ONE WHO HAS BEEN FRAUDULENTLY INDUCED TO SELL PROPERTY AT PRICE FAR BELOW ITS VALUE, and afterwards discovers the fraud, does not waive the fraud by accepting the amount agreed to be paid for the property. She may claim the amount due her under the contract, and still have an action against the defendant to recover compensation for the injury occasioned by his fraud. *Mallory v. Leach*, 625.
3. CONFIDENTIAL RELATION BETWEEN TWO PERSONS MUST BE SHOWN TO EXIST AT TIME DEFENDANT is claimed to have defrauded plaintiff by a violation of it. Where an estrangement between two persons who formerly occupied confidential relations toward each other is shown prior to the time one claims to have been damaged by relying upon the advice and disclosures of the other, the former has no cause of action for the fraud. *Id.*
4. WHERE ONE WHO OCCUPIES CONFIDENTIAL RELATION TOWARDS ANOTHER WHO IS OWNER OF SOME SHARES OF STOCK tells the latter that a large assessment is about to be levied upon the stock, without at the same time telling her other facts within his knowledge which would enhance her confidence in the value of her property, whereby she is induced to sell her stock to defendant at a price much below its true value, he is

liable for damages for his fraud, the measure of which would be the difference between the price paid and the true value of the stock. *Id.*

5. **FRAUD AS DEFENSE TO SUIT ON BOND.**—While a party to a bond is estopped at law from showing want of consideration or a different consideration from that therein contained, or fraud in any matter collateral to the consideration, yet while the bond remains executory, and defendant specially pleads that it was procured by fraud, covin, and misrepresentation of plaintiff, setting forth wherein such fraud consists, and thus showing that it reaches to the substance of the consideration, he is not estopped from availing himself of such defense. *Phillips v. Potter*, 508.

See BONDS; FRAUDULENT CONVEYANCES; JURISDICTION, 3; SALES, 3-7, 16-18; WITNESSES, 4.

FRAUDULENT CONVEYANCES.

1. **VOLUNTARY CONVEYANCE IS VOID AS AGAINST CREDITORS**, where the grantor settles his property in trust for his own use for life, and over to his appointees by will. *Mackason's Appeal*, 517.
2. **OWNER CANNOT DISPOSE OF PROPERTY IN TRUST FOR HIS OWN USE** so as to put it beyond the reach of liability for his future debts. *Id.*
3. **PROPERTY SETTLED IN TRUST TO ONE'S OWN USE, AND OVER TO APPOINTEES NAMED** in a will, becomes assets in the hands of the trustees, applicable to the extinguishment of creditors' claims. *Id.*
4. **PARTIES MAY GO BEHIND JUDGMENT IN ACTION BY JUDGMENT CREDITOR** TO SET ASIDE CONVEYANCES of his debtor's real estate as being a fraud on creditors, and may inquire as to the validity of the indebtedness upon which it is based, and whether it existed at the time the conveyances were made. *Bruggerman v. Hoerr*, 97.
5. **ONE WHO CLAIMS INDEBTEDNESS ARISING OUT OF CONTRACT**, which is void or against public policy, is not a creditor within the meaning of the statute concerning fraudulent conveyances. *Id.*

GARNISHMENT.

See ATTACHMENT.

GAS COMPANIES.

1. **GAS COMPANY CANNOT REQUIRE PERSON TO SIGN WRITTEN AFFIDAVIT FOR GAS**, stating the number of burners, etc., which it might otherwise require him to sign, where the application is in an agreement, which contains a promise to abide by certain unreasonable and illegal rules and regulations adopted by the company, so that he could not sign the application without being bound by the promise; and the company by presenting the application in that shape, waives its right to insist upon the application in any other. *Shepard v. Milwaukee G. L. Co.*, 679.
2. **GAS COMPANY IS LIABLE IN SUCH DAMAGES FOR WRONGFULLY REFUSING TO SUPPLY ONE'S STORE WITH GAS** as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business, arising out of the company's refusal. *Id.*
3. **DAMAGES FOR LOSS OF PROFITS OF BUSINESS, NECESSARILY CAUSED BY GAS COMPANY'S WRONGFUL REFUSAL TO SUPPLY STORE WITH GAS**, MAY BE RECOVERED against it; and therefore, in an action against the company for such wrongful refusal, evidence by the plaintiff to show the

nature and extent of his business, and that the want of gas would tend to prevent customers from coming to his store, is admissible. *Id.*

6. DEMAND FOR GAS AND TENDER OF PAYMENT NEED NOT BE REPEATED MONTHLY, in order that an applicant may be entitled to recover damages from a gas company during all the time the gas was wrongfully withheld from him, where the rules of the company did not require payment for gas in advance, but that bills should be paid on the first of each month, and the company refused to furnish him with gas solely because he refused to sign an agreement to abide by certain illegal rules and regulations of the company. *Id.*

GROWING TREES.

1. TREE GROWING NEAR DIVISION LINE SO THAT ITS ROOTS EXTEND ON EACH SIDE is wholly the property of him on whose property the trunk stands, *semble. Dubois v. Beaver, 326.*
2. TREE, TRUNK OF WHICH IS DIVIDED BY BOUNDARY LINE, belongs to the adjoining proprietors as tenants in common, *semble. Id.*
3. TREMPASS FOR DESTRUCTION OF LINE TREES lies by proprietor of land against adjoining proprietor, whether the plaintiff's interest be several or as a tenant in common. *Id.*

See CO-TENANCY, 5.

GUARDIAN AND WARD.

1. SLAVES BELONGING TO WARD, in the possession of her guardian or his bailee, are in the possession of the ward, and upon her marriage her possession is transferred to her husband, who may maintain suit for them after her death, although he has never had actual possession. *Sallee v. Arnold, 144.*
2. SLAVES BELONGING TO WARD, in the possession of her guardian, are in the possession of the ward. Guardian acts in mere fiduciary capacity, and is the agent of the ward in all matters relating to the trust property. *Id.*
3. SUFFICIENCY OF PETITION OF GUARDIAN UNDER MICHIGAN STATUTE (Comp. Laws, sec. 3099), for license to sell the lands of his ward, pointed out. *Nichols v. Lee, 57.*
4. ACT OF LEGISLATURE AUTHORIZING GUARDIAN TO SELL the lands of his wards, and to apply the proceeds thereof to their maintenance and support, under order of court, is not unconstitutional as encroaching upon the prerogative of the judicial department of the government. *Stewart v. Griffith, 143.*

See BAILMENTS.

HABEAS CORPUS.

See PARENT AND CHILD, 1.

HANDWRITING.

See EVIDENCE, 17, 18; WITNESSES, 7, 8.

HIGHWAYS.

PRIVATE ACTION WILL NOT LIE AGAINST SUPERVISOR OF HIGHWAYS for damages sustained from his neglect to keep a bridge in his district in repair. *Dunlap v. Knapp, 468.*

See NUISANCE, 2; OFFICE AND OFFICERS, 7-9; WAYS.

HIRING.

See MASTER AND SERVANT, 8.

HOMESTEADS.

1. LAW EXEMPTING FROM FORCED SALE QUARTER OF ACRE OF LAND in city or village with the dwelling-house thereon, and its appurtenances, does not exempt offices and stores erected thereon, and rented by the debtor, and the portions of the lot on which they are built. *Casselman v. Packard*, 710.
2. HOMESTEAD EXEMPTION OF GIVEN QUANTITY OF LAND has regard to purpose for which it is used, and will not cover all the buildings which may be erected upon the land, whatever may be their character, or for whatever purposes they are designed, merely because the debtor lives in one of them. *Id.*
3. HOMESTEAD EXEMPTION EXTENDS ONLY TO PORTION OF PROPERTY occupied as a homestead, whether such portion is to be severed from other portions by perpendicular or horizontal lines. *Per Dixon, C. J. Id.*
4. ACTUAL RESIDENCE UPON PREMISES CLAIMED AS HOMESTEAD IS NECESSARY under the Minnesota homestead act of 1858, to exempt them from sale on execution. *Tillotson v. Millard*, 112.
5. JUDGMENT LIEN ATTACHES TO HOMESTEAD owned and occupied by the debtor as a residence, and may be enforced whenever the premises cease to be occupied by the debtor or his family as a homestead. *Id.*
6. LEGISLATURE CANNOT DEPRIVE JUDGMENT CREDITOR OF HIS LIEN ON HOMESTEAD PREMISES, after the right is perfected by the docketing of the judgment; nor of his right to sell the property on execution, upon its ceasing to be a homestead. *Id.*
7. ACT ENLARGING RIGHTS OF HOMESTEAD OWNERS IS PROSPECTIVE ONLY, and cannot affect judgments obtained prior to its passage. *Id.*

See CONSTITUTIONAL LAW, 4; STATUTES, 6.

HUSBAND AND WIFE.

1. RESULTING TRUST IN FAVOR OF WIFE IS NOT ESTABLISHED, or any interest paramount to the title of her husband shown, by the fact that with the consent of her husband she contracted to purchase a lot of land, which was conveyed to the husband, who paid the purchase-money, and also a part of the cost of a house erected on the lot, and the balance was secured by his bond and mortgage on the premises, which was afterwards paid by the wife from her earnings. *Skillman v. Skillman*, 279.
2. EARNINGS OF WIFE BELONG TO HUSBAND, at the common law; and they do not become the property of the wife even in equity, without a clear, express, irrevocable gift, or some distinct affirmative act of the husband divesting himself of them or setting them apart for her separate use. *Id.*
3. HUSBAND ACQUIRES NO RIGHT to wife's chose in action, unless he reduces it into his possession during the coverture. *Sallee v. Arnold*, 144.

See ASSAULT, 1, 2; ENTICEMENT; GUARDIAN AND WARD, 1; INSURANCE, 1; MARRIAGE AND DIVORCE; MARRIED WOMEN; WILLS, 4-6; WITNESSES, 6.

INDICTMENTS.

See CRIMINAL LAW; NUISANCE, 2; RAILROADS, 2.

INFANCY.

MORTGAGE OF INFANT FEME COVERT CREATES NO VALID CHARGE on the lands, as against her. *Adams v. Ross*, 237.

See GUARDIAN AND WARD; PARENT AND CHILD.

INJUNCTIONS.

INJUNCTION WILL LIE TO RESTRAIN PARTY FROM DIVERTING WATER OF STREAM, by means of a ditch extending into his land, whereby the water is diverted from machinery, which is valuable and extensive, giving employment to a large number of persons. *Wright v. Moore*, 731.

See TRADE-MARKS, 3; TRUTH, 2.

INSOLVENCY.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; PARTNERSHIP, 6, 7.

INSTRUCTIONS.

See PLEADING AND PRACTICE.

INSURANCE.

1. INSURANCE POLICY UPON LIFE OF HUSBAND FOR BENEFIT OF HIS WIFE, taken out under the act of 1840, cannot be assigned so as to destroy the rights of the wife. *Eadie v. Skimmon*, 395.
2. ACTS AND DECLARATIONS OF AGENTS OF INSURANCE COMPANY, AT TIME OF TAKING RISK and renewing the same, are admissible in an action on an insurance policy, notwithstanding the rule concerning parol evidence affecting written contracts, for this rule must yield to the rule that the company cannot take advantage of the mistakes and omissions of its agents within the scope of their employment. *Beal v. Park F. I. Co.*, 719.
3. INSURANCE POLICY IS NOT AVOIDED BECAUSE OF MISTATEMENTS OF MATERIAL FACTS contained therein, where it is filled out, issued, and renewed by the agents of the insurance company upon a personal inspection and survey of the premises, there being no fraud or misrepresentation on the part of the insured. *Id.*
4. "LEVIED ON" AND "TAKEN INTO POSSESSION OR CUSTODY," HAVE SAME MEANING in the clause of an insurance policy, conditioned that the insurance should cease at the time property "shall be levied on or taken into possession or custody," and mean an actual levy and change of possession. *Commonwealth Ins. Co. v. Berger and Butz*, 504.
5. MERE NOTICE OF LEVY WITHOUT TAKING POSSESSION OF GOODS, though good as a levy, will not defeat an insurance policy which provides that it shall cease if the goods "be levied on or taken into possession or custody." *Id.*
6. STATEMENT OF LOSS MADE BY INSURED UNDER OATH according to the requirement of the insurance policy, is not admissible in evidence to show the amount or extent of the loss. *Lycoming Ins. Co. v. Schreffler*, 501.
7. ACTS CONSTITUTING WAIVER OF NOTICE "FORTHWITH."—Where an insurance company, after a delayed notice of a fire, sends two agents at different times to ascertain the loss, and with offers to compromise and settle, it has by these acts waived the objection that the notice was not sent "forthwith," and is estopped from setting it up in an action by the insured for the loss. *Id.*

JOINT DEBTORS.

See STATUTE OF LIMITATIONS, 6.

JUDGMENTS.

1. DECREE IS NOT EVIDENCE AGAINST STRANGER TO RECORD. *Cameron v. Cameron*, 652.
2. UNSATISFIED JUDGMENT IN TROVER against one of two guilty of a joint tort, is a bar to an action of trespass by the same parties against the other joint tort-feasor. *Hunt v. Bates*, 592.
3. LEGAL EFFECT OF JUDGMENT UNDER STATUTE TO BIND LANDS OF DEFENDANT, and subject them to sale, cannot be impeached collaterally by averment, and proof that the defendant was a married woman; and a sale of lands thereunder is valid. *Callen v. Ellison*, 448.
4. JUDGMENT OF COURT OF GENERAL JURISDICTION CANNOT BE COLLATERALLY IMPEACHED, on the ground that the court had no jurisdiction of the parties defendant, where the record shows a finding by the court that the defendants, by C., their attorney, came into court, and by virtue of his power of attorney filed in the court, confessed judgment for the defendants for the sum of, etc., notwithstanding the power of attorney on file was not executed by some of the defendants, who were in fact, at the time, married women; for the power of attorney is no part of the record, and the finding shows the existence of jurisdiction. *Id.*
5. FOREIGN JUDGMENT CONCLUSIVE. — Judgment of a court of a foreign country, duly proven, is conclusive between the parties, where there has been a trial upon the merits, and there has been no fraud or want of jurisdiction, or mistake shown, or offered to be shown. It only remains competent for the defendant to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained. *Lazier v. Westcott*, 404.
6. FORMER JUDGMENT BETWEEN TWO PARTIES IN CIVIL SUIT IS NOT CONCLUSIVE between them in a subsequent penal suit, although exactly the same question is in dispute, as the rules of evidence governing such cases are different. *Riker v. Hooper*, 646.
7. JUDGMENT, IN ACTION OF TROVER brought by one whose animal had been impounded, against the impounder, that the former had been legally notified under the statute of the impounding of his animal, is not even *prima facie* evidence of the sufficiency of such notice in an action by the impounder to recover the penalties and forfeitures provided for in the statute. *Id.*
8. JUDGMENT LIEN ON LAND OF DEBTOR is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment; and equity will protect the equitable rights of third persons against the legal lien, and will limit such lien to the actual interest which the judgment debtor has in the estate. This rule is qualified by the registration laws of particular states. *Blanchard v. Douglas*, 608.
9. PURCHASER OF LANDS ON WHICH THERE IS JUDGMENT AND MORTGAGE LIEN, WHO REDEEMS FROM SALE made in satisfaction of the judgment, which is the prior lien, and who afterwards obtains a sheriff's deed for the lands so redeemed, does not get the lands discharged of the mortgage lien, and cannot therefore prevent the mortgagee from foreclosing. *Rutherford v. Newman*, 122.

10. REDEMPTION BY JUDGMENT DEBTOR, OR HIS SUCCESSOR IN INTEREST, destroys the effect of a sheriff's sale, as such, and applies the money realized thereby as a payment upon the judgment, or other lien upon which the property was sold. Such redemption may be made without paying off prior liens; and all liens, prior and subsequent to the one from which the property is redeemed, remain unimpaired, except that the money paid on the sale or redemption operates as a payment *pro tanto* of the judgment. *Id.*
- See AUTHENTICATION OF INSTRUMENTS; ATTACHMENT, 2; ATTORNEY AND CLIENT; CRIMINAL LAW, 12; EXECUTIONS; FRAUDULENT CONVEYANCES, 4; HOMESTEADS, 6, 7; JUDICIAL SALES, 4; OFFICE AND OFFICERS, 2

JUDICIAL NOTICE.

See EVIDENCE.

JUDICIAL SALES.

1. PURCHASER AT SHERIFF'S SALE OBTAINS NO GREATER INTEREST IN LAND BY PAYMENT OF ALL OF PURCHASE-MONEY before it was made payable by the conditions of the sale than he would have had without an anticipated payment. *Garrett v. Dewart*, 570.
2. TITLE OF PURCHASER AT SHERIFF'S SALE, AFTER OBTAINING DEED, DOES NOT RELATE BACK TO DATE OF HIS BID, so as to divest from that time the ownership of the debtor whose land has been sold. Until the sale has been consummated by the acknowledgment and delivery of the deed, the debtor is entitled to the possession, with all its attendant advantages. *Id.*
3. PURCHASER OF LEASED PREMISES AT SHERIFF'S SALE HAS NO RIGHT TO RENT accruing between the time of the sale and the time of the acknowledgment and delivery to him of the sheriff's deed, according to the conditions of the sale; nor does the fact that the mortgage under which the sale was decreed and made was anterior to the renewed lease to the tenant, strengthen the purchaser's claim to the rents which had accrued when the sale was made, and while the mortgagor was in possession. *Id.*
4. SUBSEQUENT REVERSAL OF JUDGMENT WILL NOT DIVEST TITLE OF STRANGER WHO PURCHASES AT SALE and advances his money, when the sale is allowed to take place upon the judgment without any steps taken to stay proceedings. *Jesep v. City Bank*, 703.
5. PURCHASER AT SHERIFF'S SALE, without notice of prior equities, takes the land discharged therefrom. *Blankenship v. Douglas*, 608.

See EXECUTIONS; JUDGMENTS, 9, 10.

JURISDICTION.

1. JURISDICTION OF CAUSE ARISES OUT OF SOME RIGHT OR CLAIM to a thing within the territorial jurisdiction of the court, or out of some controversy between parties involving the claim of one or the other for the performance of some act; as the payment of money, the transfer of property, or the doing, or omission, or forbearance to do some act, which controversy the court is invested with authority to decide. *Callen v. Ellison*, 448.
2. JURISDICTION OF PERSON IS ACQUIRED BY PERSONAL NOTICE OR SERVICE OF PROCESS; and other modes have been substituted by express provision of law, or the practice of courts, as publication, notice to the agent

or attorney of the party, or an appearance for him by one of the attorneys of the court. *Id.*

3. IF COURT OF LAW HAS FIRST ACQUIRED JURISDICTION AND DECIDED CASE, where courts of law and of equity have concurrent jurisdiction, a court of equity will not interfere to set aside the judgment, unless the party has been prevented by some fraud or accident from availing himself of the defense at law. *Dutil v. Pacheco*, 749.

See ADMIRALTY, 2, 4; EQUITY; JUDGMENTS; PROCESS, 2.

JURY AND JURORS.

TRIAL BY JURY IN COMMON-LAW CAUSES IS CONSTITUTIONAL RIGHT, and a law that any such causes shall be tried "agreeably to the course of a court of chancery" is obnoxious to this right, and void. *North Penn. Coal Co. v. Snowden*, 530.

See PLEADING AND PRACTICE, 12-15; QUESTIONS OF LAW AND FACT; REPLEVIN.

LANDLORD AND TENANT.

See EJECTMENT, 1-5; POSSESSION, 1; TRADE-MARKS, 2.

LARCENY.

See CRIMINAL LAW, 1-5.

LIENS.

See ADMIRALTY; ATTACHMENT; ATTORNEY AND CLIENT; EXECUTIONS; HOMESTEADS, 5, 6; JUDGMENTS, 8, 9; MECHANICS' LIENS; STATUTES, 6.

LIFE ESTATES.

See ESTATES, 2, 6.

MANDAMUS.

See CRIMINAL LAW, 1, 2; RAILROADS, 2.

MARITIME LAW.

See ADMIRALTY.

MARRIAGE AND DIVORCE.

1. VOLUNTARY SEPARATION BY WIFE FROM HUSBAND PENDING SUIT AGAINST HER FOR DIVORCE on the ground of adultery does not constitute willful desertion; because the legal presumption is, that the separation took place by the procurement or with the assent of the husband, and because it is legally improper for the parties to cohabit during the pendency of such a suit. *Marsh v. Marsh*, 251.
2. ALLOWANCE TO WIFE FOR SEPARATE MAINTENANCE PENDING SUIT AGAINST HER FOR DIVORCE is made upon the principle that it would be improper for the parties to cohabit during the pendency of such suit, and without regard to the question whether or not she has been compelled to leave the house of the husband. *Id.*
3. DESERTION IS QUESTION OF INTENTION, and any circumstances which render it necessary or proper that a wife should reside elsewhere than

with her husband, constitute a valid defense to a charge of desertion against her. *Id.*

4. LIBEL FOR DIVORCE CANNOT BE PROSECUTED BY LIBELANT'S FATHER, or any third person, where the libelant died before the libel was entered, for the purpose of having the libelee excluded from a share in the estate of her husband, or from the custody of their child. *Kimball v. Kimball*, 194.
5. DIVORCE WILL NOT BE GRANTED FOR ADULTERY OF HUSBAND, WHEN ONLY EVIDENCE OF GUILT IS THAT HE WAS AFFECTED WITH VENEREAL DISEASE within six months after the marriage. *Mount v. Mount*, 276.
6. CAUSE OF DIVORCE SHOULD BE SET FORTH IN PETITION PARTICULARLY AND SPECIALLY, under the North Carolina statute. *Joyner v. Joyner*, 421.
7. CIRCUMSTANCES MAY EXIST WHERE WIFE WILL NOT BE GRANTED DIVORCE BECAUSE HUSBAND STRUCK HER with a horse-whip, or switch, inflicting bruises. *Id.*

See CRIMINAL LAW, 7; WITNESSES, 3.

MARRIED WOMEN.

DEED TO MARRIED WOMAN vests title in her in fee, with absolute power of alienation, where it provides that the grantor transfers all right, title, and claim to the property to the grantee and her heirs, in a direct line, to have, manage, and dispose of, at her will and pleasure, as her property, free from any engagements or encumbrances which the husband might enter into; it being necessary that the property should remain as the property of the children, the heirs of the wife. *English v. Beeble*, 126.

See ASSAULT AND BATTERY, 1, 2; HUSBAND AND WIFE; INFANCY; JUDGMENTS, 2.

MASTER AND SERVANT.

1. MASTER IS RESPONSIBLE TO SERVANT FOR INJURIES RECEIVED BY LATTER, FROM DEFECTS IN BUILDING WHERE SERVICES ARE RENDERED, such defects being known to the master, or such as he ought to have known by exercising due care. *Ryan v. Fowler*, 315.
2. EMPLOYEE MAY RECOVER DAMAGES FROM EMPLOYER, FOR INJURIES RECEIVED by the fall of a privy insecurely and dangerously attached to the factory in which he was employed. *Id.*
3. BREACH OF CONTRACT FOR HIRE—FORMER RECOVERY.—Where a servant who has been wrongfully dismissed sues and recovers before the expiration of the term for which he was hired, such recovery can only be regarded as damages for the breach of the contract, and is a bar to any further recovery thereunder. *Booge v. Pacific Railroad*, 160.

MECHANICS' LIENS.

1. MECHANIC'S LIEN IS NOT AFFECTED BY FACT THAT OWNER CONVEYED AWAY LAND, pending the erection of the building, the conveyance being merely as collateral security for the payment of a debt due to the grantee, and intended as a mortgage, and upon the satisfaction of the debt, the land was reconveyed. These circumstances dispose of the objection that the building was not erected by the owner of the land, nor by his consent expressed in writing. *Gordon v. Torrey*, 273.

2. **Mechanic's Lien is not Affected by Change of Ownership** during the progress of the building. The change of ownership does not make a new commencement of the building. *Id.*
3. **Mechanic's Lien is not Affected by Interruption of Work** for a short period, and its subsequent resumption without a change of its original character. The interruption and subsequent resumption do not constitute a new commencement. *Id.*
4. **Time of Commencement of Building, and Consequent Attaching of Mechanic's Lien, is not Required to be Specified**, by the New Jersey statute, either in the lien itself, or in the record of the judgment. *Id.*
5. **Mechanic's Lien is not Affected because Owner of Premises Procured it to be Filed, and Concealed its Existence from Mortgagees at the time of obtaining a loan.** *Id.*

MINES AND MINING.

See Co-tenancy, 1.

MISTAKE.

See Mortgages, 21.

MORTGAGES.

1. **Mortgage is, in California, mere security operating upon property as lien or an encumbrance only**, and is not regarded as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. This doctrine was established not merely from a consideration of the provisions of the statute of 1851, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind. But the provisions of that statute led the court to carry the equitable doctrine as to mortgages to its legitimate and logical result, by regarding the mortgage as a security under all circumstances, both at law and in equity. *Dutton v. Warehamer*. 765.
 2. **Character of mortgage as mere security is not changed by default** in the payment of the debt secured, and payment after default will operate equally as an extinguishment of the lien with payment at the maturity of the debt. *Id.*
 3. **Possession of mortgagee under mortgage does not enlarge his interest**, nor in any way affect it. *Id.*
 4. **Mortgagee after condition broken cannot convey legal title**, whether he is in or out of possession, and his deed as mortgagee alone, without a transfer of the debt, passes nothing. *Id.*
 5. **Possession taken by mortgagee by consent of mortgagor**, after condition broken, will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured; and unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. *Id.*
 6. **Temporary possessory right of mortgagee in possession after condition broken may be transferred**, and the transferee will be substituted to the same rights and liabilities. *Id.*
- Power to sell and convey land not under seal**, though insufficient to authorize the execution of a conveyance of the fee, is nevertheless a sufficient authority for the execution of a contract of sale; and an instru-

- ment made by the donee reciting the sale is a sufficient "note or memorandum" of such contract, and though inoperative as a conveyance, is good as an agreement to convey. *Id.*
9. NATURE AND OBJECT OF MORTGAGES OF RAILROAD DO NOT GIVE THEM ANY MORE ENLARGED MEANING, where the company mortgages separately, at different times, the two divisions of its road, to raise money to complete the road, and neither of the mortgages contains any language purporting to convey materials to be thereafter acquired, any further than they become a part of or appurtenant to the road, or were used in operating it. *Farmers' L. & T. Co. v. Commercial Bank*, 689.
 10. RAILROAD COMPANY IS NOT ESTOPPED FROM DENYING THAT RAILROAD CHAIRS WERE CONVEYED BY PRIOR MORTGAGES, where, after having subsequently acquired the chairs, it executed another mortgage of its road and appurtenances, and all "materials," which mortgage was declared to be subject to the lien of the two prior mortgages, "in all respects prior, superior, and senior liens upon the property and premises described therein, respectively, acquired and to be acquired." *Id.*
 11. WHERE MORTGAGEE OF ONE PIECE OF LAND CONVEYS AWAY ANOTHER PIECE OF LAND, and in his conveyance describes the latter as subject to his mortgage, this reservation is just as effectual to charge the property conveyed with the encumbrance of the mortgage debt as if it had been included in the mortgage deed. *Sweetser v. Jones*, 639.
 12. PAROL EVIDENCE IS COMPETENT ON BEHALF OF DEFENSE IN SUIT BY MORTGAGEE, OR HIS ASSIGNEE, TO FORECLOSE MORTGAGE conditioned for the payment of a sum certain, that the mortgage was given to indemnify the mortgagee and such assignee for becoming bail for a third person, and that he had not become such bail, or having done so, he had been discharged of his liability without being damnified. *Colman v. Post*, 49.
 13. MORTGAGE CONDITIONED FOR PAYMENT OF NEGOTIABLE PROMISSORY NOTE, but really given and assigned with the note to indemnify the assignee for procuring bail, is discharged when the bail have been discharged without damage; and neither the assignee, nor one to whom he transfers the note and mortgage after due, can collect the amount thereof as *bona fide* holder. *Id.*
 14. EQUITY WHICH ENTITLES SECOND MORTGAGEE TO BENEFIT OF RELEASE BY FIRST MORTGAGEE of a portion of the mortgaged property not covered by the second mortgage, arises only where the first mortgagee gave the release with knowledge of the existence of the second encumbrance. *Vanorden v. Johnson*, 254.
 15. RECORDING OF SECOND MORTGAGE WILL NOT OPERATE AS CONSTRUCTIVE NOTICE of its existence to a prior mortgagee, so as to make a release by the latter of property not covered by the second mortgage inure to the benefit of the second mortgagee. *Id.*
 16. CLAIM OF SECOND MORTGAGEE TO BENEFIT OF RELEASE BY PRIOR MORTGAGEE is a mere equity, resulting from the fact that his security is impaired by the giving of the release, and will not be allowed, unless upon principles of justice and equity it ought thus to operate; and where the security of the second mortgagee is not impaired by the release, no equity will accrue in his favor. *Id.*
 17. WHERE MORTGAGEE WHO SELLS UNDER POWER CONTAINED IN MORTGAGE, AND BECOMES HIMSELF PURCHASER indirectly by having the mortgaged premises bid in for himself, such sale is voidable only, but not void; the legal title passes thereby. *Blockley v. Fowler*, 747.

17. ORDER SETTING ASIDE SALE ON FORECLOSURE OF MORTGAGE IS APPEALABLE in Wisconsin. *Jessup v. City Bank*, 703.
 18. SALE ON FORECLOSURE TO PLAINTIFF IN JUDGMENT SHOULD NOT BE SET ASIDE ON SUBSEQUENT REVERSAL OF JUDGMENT, unless it is shown that there was some unfairness in the sale, or that the property would bring a larger amount on resale, when the sale is allowed to take place, without any steps taken to stay proceedings, and the reversal does not defeat the entire claim, but only reduces its amount; although the sale might be set aside, if the reversal shows that the plaintiff had no claim under the mortgage, and consequently no right to have the property sold at all. *Id.*
 19. PAYMENT OF MORTGAGE BY AGENT FOR AND WITH FUNDS OF MORTGAGOR, DISCHARGES MORTGAGE, although the agent, instead of having it discharged, causes it to be assigned to secure a debt owing by himself. In such case, neither the assignee nor one who takes an assignment from him can hold the mortgage as against the mortgagor or his heirs. *Nichols v. Lee*, 57.
 20. ASSIGNEE OF MORTGAGE STANDS IN PLACE OF MORTGAGOR, and any equities between such assignee and the mortgagor affect the mortgage in the hands of any subsequent assignee. *Id.*
 21. MORTGAGE CANCELED OF RECORD AND SURRENDERED UP, UNDER MISTAKEN IMPRESSION THAT IT HAD BEEN SATISFIED, will be decreed to be a subsisting lien on the mortgaged premises. *Banta v. Vreeland*, 269.
- See BONA FIDE PURCHASERS, 1-3; INFANCY; JUDGMENTS, 9; MECHANIC'S LIENS, 6; STATUTE OF LIMITATIONS, 4-7.

MUNICIPAL CORPORATIONS.

See ATTACHMENT, 1; CORPORATIONS.

NEGLECTENCE.

1. IN ACTION AGAINST POSTMASTER FOR NEGLIGENCE BY WHICH LETTER OF PLAINTIFF WAS LOST, evidence of specific acts of negligence in relation to other letters is not admissible to prove negligence in respect to the letter in question. *Wentworth v. Smith*, 228.
 2. IN CASES OF MUTUAL, CONCURRING NEGLIGENCE, neither party can maintain an action against the other. *Heil v. Gladding*, 537.
 3. UNAUTHORIZED USE OF RAILROAD OF ANOTHER IS NEGLIGENCE. *Id.*
 4. INJURY FROM COLLISION BETWEEN TWO INTRUDERS ON RAILROAD creates no right of action in either against the other. *Id.*
- See COMMON CARRIERS; RAILROADS, 3, 4.

NEGOTIABLE INSTRUMENTS.

1. UNSIGNED INDORSEMENTS OF SUMS OF MONEY PAID ON PROMISSORY NOTE are of themselves no evidence. *Turrell v. Morgan*, 101.
2. INTRODUCTION OF NOTE IN EVIDENCE DOES NOT CARRY WITH IT the indorsements on the back of it of money paid. *Id.*
3. PROMISE TO ACCEPT BILL FOR FIXED AMOUNT IS EQUIVALENT TO ACCEPTANCE, not only as to the drawer, but as to every party who takes the bill on the faith of that promise. *Steman, Baker, & Co. v. Harrison*, 491.
4. INDORSER OF PROMISSORY NOTE IS ENTITLED TO NOTICE OF DISHONOR, although he receives of the makers a mortgage of all their property to indemnify him against liability. *Moses v. Ella*, 175.

5. DEMAND AND NOTICE ARE NOT NECESSARY, if, as between the maker of a note and the indorser, the duty to pay is upon the latter. *Id.*
 6. INDORSER ON PROMISSORY NOTE CANNOT SHOW BY PAROL that he was an indorser without recourse. *Kern v. Von Phul*, 105.
 7. CERTIFICATE OF NOTARY THAT HE DEMANDED PAYMENT, AND GAVE NOTICE of the dishonor of a note to the indorsers thereon, is *prima facie* evidence of the facts stated in it, under the Minnesota statute of 1858. *Id.*
 8. NOTICE OF PROTEST MAY BE SERVED BY MAIL on a person living in the same town in which the notice is mailed, under the Minnesota statute of 1858. *Id.*
 9. NOTICE OF PROTEST NEED NOT BE SENT UNDER COVER of what is popularly called an envelope. *Id.*
 10. NOTARY'S PROTEST IS VALID, though he do not keep a record of it. *Id.*
 11. ACTION UPON NOTE EXCUTED ON SUNDAY cannot be sustained under the laws of Minnesota. *Brimhall v. Van Campen*, 118.
- See BANKS AND BANKING; COLLATERAL SECURITIES; MORTGAGES, 12; STATUTE OF LIMITATIONS, 4; WITNESSES, 2.

NEWSPAPERS.

WHERE PERSON NOT REGULAR SUBSCRIBER FOR NEWSPAPER TAKES IT FROM POST-OFFICE, through which it is regularly sent to him by the publisher, pays postage therefor, and upon bills therefor being sent to him, refuses to pay them, saying that he is not a subscriber, but still continues to receive the paper as before, neither returning it, nor giving notice to the publisher, the law will imply a promise on his part to pay for the paper according to the usual terms; and an action of *assumpsit* will lie to recover the amount found due within six years from the date of the writ. *Fogg v. Portsmouth Athenæum*, 191.

See CONTRACTS, 2.

NEW TRIALS.

See PLEADING AND PRACTICE.

NUISANCE.

1. ONE WHO ERECTS AND STILL CONTINUES NUISANCE IS NOT ENTITLED TO NOTICE before suit, although the premises claimed to be injured by the nuisance have been conveyed. But he who erects a nuisance does not, by conveying the land to another, transfer the liability to the grantee, and the latter is not liable until, upon request, he refuses to remove the nuisance. *Eastman v. Amosbeag Mfg. Co.*, 201.
2. ACT AUTHORIZING PERSON TO BUILD DAM ON HIS OWN LAND upon a river which is a highway, merely protects him from an indictment for a nuisance in obstructing the river; but if in building his dam he overflows his neighbor's land, he is still liable to an action therefor. *Id.*
3. THERE CAN BE NO PRESCRIPTIVE RIGHT TO MAINTAIN PUBLIC NUISANCE, and no period of enjoyment can legalize the continuance of a mill-pond which is injurious to the health of the surrounding community. *Wright v. Moore*, 731.
4. RIPARIAN PROPRIETOR HAS RIGHT TO ABATE AS NUISANCE a dam erected on the stream below him, and which throws back the water upon his lands. The proper mode of abatement is to lower the dam, if there be a prescriptive right for it, to the height authorized by the prescription, AM. DEC. VOL. LXXXII—62

or in the absence of prescription, to such a height as will stop the reflux of the water at his boundary line. *Id.*

See STATUTES, 4.

OFFICE AND OFFICERS.

1. PLAINTIFF CAN RECOVER ONLY DAMAGES ACTUALLY SUSTAINED, in an action against an officer for carelessly and negligently accepting a delivery bond with insolvent and irresponsible securities, for property taken by him in a prior suit. *Mortland v. Smith*, 123.
2. JUDGMENT IN ORIGINAL CASE is evidence against officer only of the damages actually sustained by plaintiff in an action by the latter against the former for taking an insufficient delivery bond for personal property taken in the original suit. In such case the original judgment is evidence against defendant that it was rendered. *Id.*
3. OFFICIAL BOND IN WHICH ONE PERSON, AS PRINCIPAL, AND SEVERAL OTHERS, AS SURETIES, are bound unto the people in the respective sums affixed to their names, a different sum being set opposite the name of each surety, for the payment of which they severally bind themselves, their heirs, etc., is an instrument embracing several distinct obligations by which the principal and each of the sureties bind themselves in the sums designated, not jointly and severally, but only jointly. The term "severally," as used in the instrument, applies only to the different sums which the parties, respectively, specify as the limit of the liability they assume. *People v. Hartley*, 758.
4. SIGNATURE OF PRINCIPAL IS ESSENTIAL TO VALIDITY OF BOND which is the joint, and not the joint and several, bond of him and his sureties, and without his signature it has no binding force upon his sureties. *Id.*
5. ABSENCE OF SIGNATURE OF PRINCIPAL TO OFFICIAL BOND IS NOT SUCH DEFECT AS CAN BE CURED, upon its suggestion in a complaint, under section 11 of the California act concerning official bonds. *Id.*
6. TOWNSHIP OFFICERS ARE NOT PERSONALLY LIABLE FOR ACTS DONE HONESTLY, in the exercise of the discretion which the law gives them, even though that discretion be exercised so mistakenly as to work an injury to private property or private individuals; but they are liable if they act maliciously or wantonly, and if the work which they perform is done rather to injure an individual than to discharge a public duty. *Yealy v. Fink*, 556.
7. TOWNSHIP SUPERVISORS ARE NOT PERSONALLY LIABLE FOR BUILDING CAUSEWAY INSTEAD OF BRIDGE, in laying out a road across a stream, thereby injuring a mill-owner below, unless they acted with a malicious design to do the mill-owner injury, or with such a reckless and wanton disregard of his interests as would be equivalent to malicious intent. *Id.*
8. JURY MAY PROPERLY INQUIRE WHETHER INJURY WAS COMMITTED BY JOINT ACT of supervisors of adjoining townships, in erecting a causeway across a stream. The erection of the causeway was one act, though parts of it were built at different times and by different defendants. *Id.*
9. WANT OF MALICIOUS INTENT IN BUILDING CAUSEWAY INSTEAD OF BRIDGE MAY BE SHOWN BY TOWNSHIP SUPERVISOR in an action against him for an injury caused thereby, by evidence that before the work was commenced he had received a message from a supervisor of an adjoining township that the latter would not join in building a bridge, because the people of his township were opposed to it. *Id.*

10. NO PRESUMPTION IS INDULGED THAT OFFICER ACTING UNDER NAKED STATUTORY POWER, with a view to divest, upon certain contingencies, the title of the citizen, has done his duty and complied with the law; the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed. *Keane v. Connors*, 738.

See HIGHWAYS.

PARENT AND CHILD.

1. FATHER IS ORDINARILY ENTITLED TO CUSTODY OF HIS MINOR CHILDREN, and upon *habeas corpus*, courts have power to award it to him. But the application is addressed to the discretion of the court, and such custody may be withheld from the father when it is made clearly to appear that by reason of his unfitness for the trust, or of other sufficient causes, the permanent interests of the child would be sacrificed by a change of custody. *State v. Libbey*, 223.
2. COURT WILL, IN DETERMINING QUESTION OF CUSTODY OF CHILD, TAKE INTO CONSIDERATION its condition with the persons from whose custody it is sought to be taken, its relation to them, the present and prospective provision for its support and welfare, the length of its residence there, and whether with the consent of its father, and the understanding, tacit or otherwise, that it should be permanent, the strength of the ties that have been formed between them, and if the child has come to years of discretion, its wishes upon the subject. *Id.*
3. RIGHTS AND DUTIES OF FATHER CANNOT BE TRANSFERRED PERMANENTLY EXCEPT BY DEED, and a parol agreement to transfer them may be revoked by the father, upon refunding the sums of money expended under it. *Id.*

See MARRIED WOMEN.

PARTITION.

See EQUITY, 14, 15.

PARTNERSHIP.

1. WHERE AUTHORITY OF AGENT OR PARTNER DEPENDS UPON SOME FACT outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact. *Griswold v. Haven*, 380.
2. WHERE ONE OF FIRM OF WAREHOUSEMEN FALSELY REPRESENTED to a person who advanced money on the faith of such representation, that he had on storage with the firm a certain quantity of grain, the innocent partners were held bound by such representation and by the firm receipts given by the former for such money, and responsible therefor. *Id.*
3. WHERE PARTNER FALSELY REPRESENTED THAT HE HAD GRAIN ON STORAGE with his firm of warehousemen, and sold the same, giving the firm receipt for the price, the purchaser suing for conversion of the grain was entitled to recover, though evidence was improperly received which showed that the grain never had existence. *Id.*
4. AGREEMENT BY CREDITOR OF FIRM TO RELEASE ONE PARTNER FROM LIABILITY, OR COVENANT NOT TO SUE HIM FOR TWENTY YEARS, on his giving security for the payment of a portion of the debt, does not operate to release or discharge the other partners. *Roberts v. Strang*, 729.

5. LAND PAID FOR WITH PARTNERSHIP FUNDS, AND USED AND OCCUPIED FOR PARTNERSHIP PURPOSES, will be regarded as partnership property, even in a controversy between partnership and private creditors for priority. *Willis v. Freeman*, 619.
6. CREDITOR OF ONE MEMBER OF PARTNERSHIP cannot have his debt satisfied out of his creditor's interest in the partnership funds, unless sufficient assets remain to pay all the firm creditors. If the partnership is insolvent, the firm creditors have a right to have all the property applied to the payment of their debts. *Id.*
7. CREDITOR OF MEMBER OF FIRM, WHICH AFTERWARDS BECOMES INSOLVENT, who has attached his debtor's interest in some partnership property, prior to such insolvency, cannot have his lien divested by it. This is so, although judgment was not rendered until after the insolvency. *Id.*
See SALES, 14.

PERSONAL PROPERTY.

See CHOICES IN ACTION; RECAPTION.

PLEADING AND PRACTICE.

1. DEFENDANT'S APPEARANCE AND ORAL ADMISSION OF CAUSE OF ACTION, for which the plaintiff declares in justice's court, authorise the entry of judgment against him, where the action is commenced by due service of process. The statute requires a written confession signed by the defendant only, where the parties appear without process. *Crosse v. Derbyshire*, 51.
2. AFFIDAVIT MADE BY DEFENDANT FOR CHANGE OF VENUE, SHOWING OWNERSHIP OF PROPERTY, is admissible to show his wealth, in an action against him for an assault and battery. *Barnes v. Martin*, 670.
3. ERROR AS TO WHO SHOULD BE ALLOWED TO OPEN AND CLOSE a case furnishes no ground for a new trial, and the verdict will not be disturbed on that account, unless it is shown that the party has been materially prejudiced thereby. *Farwell v. Brennan*, 137.
4. AVERRING GREATER DAMAGES THAN PROVED is no variance. *Mallory v. Leach*, 625.
5. VARIANCE BETWEEN ALLEGATIONS AND PROOF, AS TO DATE ON WHICH JUDGMENT WAS RECOVERED, is immaterial, if it does not mislead the defendant. If he was misled, he could have had the pleading amended, or the supreme court could make the amendment; and on appeal, this court will assume the amendment to have been made. *Lanier v. Westcott*, 404.
6. VARIANCE BETWEEN ALLEGATION AND PROOF IS TO BE DISREGARDED, under the New York code, unless it appears to have misled a party to his prejudice. *Dubois v. Beaver*, 326.
7. DEMURREL TO EVIDENCE ADMITS NOT ONLY FACTS STATED IN EVIDENCE, but also every conclusion which the jury might reasonably infer therefrom. *McKown v. McDonald*, 576.
8. ADMISSION OF IRRELEVANT TESTIMONY AFTER OBJECTION THERETO will not be sufficient ground for setting aside a verdict, unless it appears or may reasonably be intended that the evidence has prejudiced the complaining party. *Lynd v. Pickett*, 79.
9. REJECTION OF COMPETENT EVIDENCE AND EXCEPTION TO RULING will not be ground for setting aside the verdict, or for a new trial, if the party

- excepting is afterwards allowed to and does introduce evidence of the same fact. *Id.*
10. **MERE DENIAL THAT PROPERTY WAS OF VALUE ALLEGED IN COMPLAINT**, where the question of value is material, is insufficient, and amounts to the pleading of a negative pregnant. The pleading should allege that the property is of no value, or should state the value as defendant claims it. *Id.*
 11. **JUDGMENT WILL NOT BE REVERSED FOR ADMISSION OF IMPROPER EVIDENCE**, where, if it had been rejected, the verdict must have been the same. *Ganson v. Madigan*, 659.
 12. **APPELLATE COURT WILL NOT DISTURB VERDICT MERELY BECAUSE EVIDENCE IS CONFLICTING**, or because the court, looking at the testimony as written down, would have come to a different conclusion from that reached by the jury, who had the witnesses before them. *Keane v. Cannon*, 738.
 13. **GENERAL CHARGE ON POINT RAISED IS SUFFICIENT** to substantially comply with the request to charge upon it. *Lycoming Ins. Co. v. Schreffer*, 501.
 14. **IT IS NOT ERROR TO INSTRUCT JURY IN ABSENCE OF PARTY AND HIS COUNSEL**, where the jury after retiring come into court while it is still in session and ask further instructions, and the absent party and his counsel are first loudly called for at the door. *Preston v. Bowers*, 430.
 15. **COURT IS NOT BOUND TO GIVE INSTRUCTION**, where the effect of it would, perhaps, be to cause the jury to attach too great importance to evidence too meager to sustain a verdict upon the principle involved in the instruction. *Blankenship v. Douglas*, 608.
 16. **OPINION OF COURT BASED ON EVIDENCE AS HE REMEMBERED IT**, and not upon the verdict alone, is unobjectionable if the verdict alone is sufficient to sustain it. *Bruggerman v. Hoerr*, 97.
 17. **VERDICT WHOLLY UNSUPPORTED BY EVIDENCE** in an essential particular is ground for a new trial. *Garcia v. State*, 605.
 18. **RULES OF COURT MAY, IN PROPER CASE, BE SUSPENDED BY JUDGE PRESIDING AT TRIAL**, in the exercise of his discretion. *Eastman v. Ameskeag Mfg. Co.*, 201.
- See COSTS; DAMAGES, 4; EJECTMENT; EQUITY; MORTGAGES, 17; SET-OFF; TRESPASS.

POSSESSION.

1. **POSSESSION OF REAL ESTATE BY TENANT IS SUFFICIENT NOTICE** to put a purchaser upon inquiry as to the title of the landlord. *Dutton v. Warschauer*, 765.
2. **POSSESSION, TO BE EQUIVALENT TO REGISTRATION**, or to amount to actual notice, or reasonable information of the claim of the party in possession, must be open and visible, or at least must not be of such character as is calculated to deceive the public. *Blankenship v. Douglas*, 608.
3. **POSSESSION OF REAL ESTATE IS EVIDENCE OF SEISIN IN FEE** in the party in possession, and no further or higher evidence of title is required to enable a plaintiff claiming under him to recover in ejectment, until the defendant shows an anterior possession, or traces title from a paramount source. *Keane v. Cannon*, 738.

See BAILMENTS.

PRESCRIPTION.

See EASEMENTS, 1-3; NUISANCE, 3, 4; WAY, 3, 4.

PRINCIPAL AND AGENT.

See AGENCY.

PROCESS.

1. WAIVER OF PROCESS, OR AUTHORITY TO WAIVE IT, as shown by the evidence, must be decided upon by the court, and its decision may be expressed upon the record, or may be necessarily implied from the action of the court. *Callen v. Ellison*, 448.
 2. DECISION OF COURT OF GENERAL JURISDICTION UPON QUESTION OF SERVICE OF PROCESS upon party, or of waiver thereof, is conclusive, and not subject to collateral attacks in domestic tribunals. *Id.*
- See EXEMPTIONS, 4, 6; JURISDICTION, 2; MORTGAGES, 7; PLEADING AND PRACTICE, 1; REPLEVIN, 3, 4.

PUBLIC LANDS.

1. PARTY WHOSE POSSESSION WAS ACQUIRED BY INTRUSION UPON PRIOR RIGHTS of another cannot invoke the protection of the Van Ness ordinance, by which the city of San Francisco relinquished and granted all her claim and title to certain lands, to the parties in the actual possession thereof, by themselves or tenants, during the period named in the ordinance. *Keane v. Cannovan*, 738.

QUESTIONS OF LAW AND FACT.

See ABANDONMENT, 3; DAMAGES, 3, 4; EVIDENCE, 18, 19; SALES, 3, 6; WATERCOURSES, 1; WILLS, 7.

RAILROADS.

1. RAILROAD COMPANY FORFEITS ITS FRANCHISE BY ABANDONMENT OF PART OF ROAD, after its completion between the points named in its charter or articles. *People v. Albany etc. R. R. Co.*, 295.
 2. RAILROAD COMPANY HAS NOT OPTION TO DISCONTINUE PART OF ITS ROAD, AND FORFEIT ITS FRANCHISE, but the remedy is not by action in equity for a specific performance, but by *mandamus* or indictment, or at the election of the people, by action to annul the charter of the corporation. *Id.*
 3. RAILROAD COMPANY IS LIABLE FOR INJURIES TO PASSENGER, CAUSED BY CONDUCTOR'S NEGLIGENCE or violence in removing him, upon refusal to pay his fare. *Pennsylvania R. R. Co. v. Vandiver*, 520.
 4. EVIDENCE THAT PASSENGER ON RAILROAD TRAIN WAS REMOVED FROM CAR BY CONDUCTOR, that he fell on the road and hurt his head and back, and that he died from the effect of these injuries, is sufficient to justify the court in letting the question of the cause of the death go to the jury, and in refusing to instruct the jury "that under all the circumstances of the case, their verdict should be for the defendant," the railroad company. *Id.*
- See ANIMALS, 2-7; COMMON CARRIERS; MORTGAGES, 8, 9; NEGLIGENCE, 3, 4.

RAPE.

See CRIMINAL LAW, 8-10.

REALTY.

See ABANDONMENT; COVENANTS; FIXTURES; POSSESSION; PUBLIC LANDS; VENDOR AND VENDEE.

RECAPTION.

1. OWNER OF CHATTEL HAS NO RIGHT TO RETAKE IT BY FORCE from one who has obtained peaceable possession of it, lawfully or unlawfully. *Barnes v. Martin*, 670.
2. ASSAULT IS COMMITTED BY OWNER OF CHATTEL IN GOING UP TO ONE IN PEACEABLE POSSESSION OF IT, with a knife, threatening and intending to commit violence upon him, in order to obtain the chattel. *Id.*
3. ONE WHO RESISTS ATTEMPT OF OWNER OF CHATTEL TO TAKE IT FROM HIS POSSESSION BY FORCE is not liable in exemplary damages, unless he is guilty of excessive force, and acts from motives of malice. *Id.*

RECORDS.

1. PART OF ORDINARY DUTY OF CLERK OF COURT OF RECORD is to extend the records of the court, from the process and pleadings on file, and from the minutes and entries on the dockets; and he cannot resort to extrinsic evidence for that purpose. He has the right to rely upon the entries made as correct, and if from their inaccuracy errors are found in the record as extended, the fault is not his. *Frink v. Frink*, 172.
2. COURT HAS IMPLIED AUTHORITY TO AMEND ITS RECORDS, so as to make them conform to the facts and truth of the case, and may do so upon any competent legal evidence. *Id.*

See AUTHENTICATION OF INSTRUMENTS.

RECOUPMENT.

See SALES, 11.

REDEMPTION.

See JUDGMENTS, 9, 10.

REGISTRATION.

See MORTGAGES, 14; POSSESSION, 2.

REMAINDERS.

See ESTATES, 6.

RENTS.

See EXECUTORS AND ADMINISTRATORS, 23; JUDICIAL SALES, 2.

REPLEVIN.

1. RIGHT OF PLAINTIFF TO RECOVER IN REPLEVIN FOR ONE HUNDRED BUSHELS OF WHEAT, which were measured out from a quantity in possession of the defendant, is not affected by the fact that he did not bring the suit for the whole, although the evidence showed that all the wheat belonged to him, and that he did not own as tenant in common with others. *Crouse v. Derbyshire*, 51.

2. PLEA IN REPLEVIN THAT DEFENDANT IS UNITED STATES MARSHAL, and holds the property by virtue of a levy under an attachment from the United States district court, is, if not denied, a conclusive defense to an action in a state court. *Lewis v. Buck*, 73.
3. ONE COURT CANNOT TAKE PROPERTY FROM CUSTODY OF ANOTHER by replevin, or any other process. *Id.*
4. PROPERTY HELD BY UNITED STATES MARSHAL UNDER WRIT FROM DISTRICT COURT cannot be taken from him by any process from a state court; and if surrendered upon a writ of replevin, the state court having custody of the property will order its return upon demand, and a showing by the marshal of his authority for holding it. *Id.*
5. DEFENDANT IN REPLEVIN MAY WAIVE RETURN OF PROPERTY AND TAKE JUDGMENT FOR ITS VALUE ALONE, in Wisconsin, where the plaintiff has obtained possession of the property, and the jury find the defendant entitled to possession. *Farmers' L. & T. Co. v. Commercial Bank*, 689.
6. JURY IS AUTHORIZED TO ASSESS VALUE OF PROPERTY IN ALL CASES, under section 11, chapter 132, Wisconsin Revised Statutes, where they find that the defendant in replevin is entitled to a return, whether he waives it or not. *Id.*

SALES.

1. DECLARATIONS OF VENDOR AT TIME OF SALE, LIMITING EFFECT OF STATEMENTS in an advertisement concerning the article sold, are admissible in an action by the vendee for a breach of warranty. *Hadley v. Clinton County Importing Co.*, 454.
2. NOTICE TO ONE OF TWO JOINT PURCHASERS CONCERNING TERMS OF SALE is notice to both. *Id.*
3. IT IS ERRONEOUS TO INSTRUCT THAT RULE OF CAVEAT EMPTOR APPLIES TO CASE, if there is any evidence in the case which requires a determination by the jury of the question whether there was fraud in the sale. *Id.*
4. INSTRUCTION THAT RULE OF CAVEAT EMPTOR APPLIES TO CASE, accompanied by general remarks concerning fraud in the sale, is calculated to mislead a jury in a case where there is evidence of fraud proper to be considered by the jury. *Id.*
5. GOOD SENSE AND LAW MORE READILY AUTHORIZE FINDING THAT VENDOR IS BOUND TO DISCLOSE a latent intrinsic defect in the article sold, more peculiarly within his knowledge, than extrinsic facts affecting its value, as to which the means of knowledge was equally accessible to both parties. *Id.*
6. WHETHER OR NOT FAILURE OF VENDOR TO DISCLOSE MATERIAL LATENT DEFECT known to the vendor and unknown to the vendee constitutes a fraud, is generally a question of fact upon which a jury should be allowed to pass. *Id.*
7. OMISSION TO DISCLOSE LATENT AND MATERIAL DEFECT known to the vendor and unknown to the vendee, is merely evidence of fraud, the effect of which the circumstances may strengthen or destroy. *Id.*
8. FRAUDULENT INTENT ON PART OF VENDOR IN IMPROPERLY CONCEALING MATERIAL FACT to the damage of the vendee, will be presumed in an action by the vendee for damages. *Id.*
9. INSTRUCTION THAT CONCEALMENT BY VENDOR OF MATERIAL LATENT DEFECT known to vendor and unknown to vendee, constitutes fraud on the part of the vendor, is erroneous, since this does not constitute fraud as a matter of law, but is merely evidence of fraud. ..

10. **VENDOR IS GUILTY OF FRAUD WHICH MAY BE PLEADED** as defense to an action for the price of the property sold, when it has a latent defect of which he is aware, but which he fails to disclose to the vendee, though he knows that the latter is acting upon the supposition that no such defect exists. In this case, it is error to strike out an answer setting up such defense. *Cecil v. Spurger*, 140.
11. **BREACH OF WARRANTY OF QUALITY OF CHATTELS** cannot be set up by way of defense, recoupment, or counterclaim, by the accommodation indorser of a note given for the price of the chattels in an action against him thereon. *Gillespie v. Torrance*, 355.
12. **CLAIM FOR DAMAGES FOR BREACH OF WARRANTY IN SALE** does not rest upon a failure of the consideration of the contract on which the action is founded, but is a distinct claim which may be set up by way of defense or counterclaim in the action for the price, or by a separate action, the election to do which rests in a principal, and cannot be made by a surety; though, it seems, a surety would be relieved in equity in case of insolvency of his principal. *Id.*
13. **ACTION CANNOT BE MAINTAINED FOR PRICE OF GOODS SOLD** to be paid for by a specific article of personal property, unless the buyer has refused to deliver the specific article after a proper demand. *McBain v. Austin*, 705.
14. **PROPER DEMAND SUFFICIENT TO SUSTAIN ACTION FOR PRICE OF GOODS SOLD** by partnership, and to be paid for by a specific article, cannot be made by one partner without an order from his copartner, if the latter made the sale, and stipulated with the buyer that the article should not be delivered except upon his order, and the buyer was unaware of the partnership. *Id.*
15. **TITLE OF VENDOR OF GOODS IS SUPERIOR AND WILL PREVAIL**, where the goods had come to the possession of the vendee, and ascertaining his insolvency, he deposited them in warehouse subject to the order of the vendor, and notified him thereof by letter, although before the vendor had signified his assent the goods were attached by another creditor. *Sturtevant v. Orser*, 321.
16. **VOLUNTARY SALE OF PERSONAL PROPERTY IS FRAUDULENT AND VOID**, AS AGAINST VENDOR'S CREDITORS, unless accompanied by an actual delivery of possession to the vendee. *Brown v. Keller*, 554.
17. **CONCURRENT POSSESSION BY VENDOR AND VENDEE IS INSUFFICIENT** to protect the property from the creditors of the vendor. *Id.*
18. **SALE IS FRAUDULENT AND VOID AS TO VENDOR'S CREDITORS**, where the parties to the sale were brothers-in-law, living in the same house, and the horse and carriage sold were kept in a stable on the lot where the parties lived, and were used by the vendor after the sale as before. *Id.*
- See **EXECUTORS AND ADMINISTRATORS**, 7, 8; **EXECUTIONS**; **FRAUD**, 2; **GUARDIAN AND WARD**, 2; **JUDICIAL SALES**; **JUDGMENTS**, 9, 10; **TRUSTS**, 5; **MORTGAGES**, 18.

SERVITUDES.

See **EASEMENTS**.

SET-OFF.

1. **STATUTORY RIGHT OF SET-OFF** IS DESIGNED TO PREVENT an unnecessary multiplication of suits, and allows the defendant to oppose in the same suit his debt against the plaintiff to plaintiff's debt against him; but de-

defendant cannot set off his debt against a stranger to the action, against plaintiff's debt against him, or litigate in plaintiff's action a claim of which plaintiff is ignorant, not being a party to it, and one of the contracting parties to which is no party to the action. *Trafford v. Hall*, 589.

2. STATUTORY RIGHT OF SET-OFF ATTACHES TO CLAIMS legally transferable, only while they constitute mutual debts of the parties to the suit. The status of such claims, as mutually binding the parties in the same right and capacity at the time of action brought, determines this right; before this period the right is collateral to and not attached to them, and contingent upon their existence as mutual debts down to the period of the suit. *Id.*

See ATTACHMENT, 2; ATTORNEY AND CLIENT.

SHERIFFS.

See JUDGMENTS, 9, 10; JUDICIAL SALES; SURETYSHIP, 4.

SHIPPING.

See ADMIRALTY.

SLANDER.

1. ACTION FOR SLANDER, FOR WORDS ACTIONABLE PER SE, CLAIMING GENERAL DAMAGES ONLY: *Held*, that the defendant could not show, in mitigation, under the general issue, that "during the six years prior to the suit, inveterate feelings of hostility had existed between the plaintiff and the defendant, and that the plaintiff had taken every opportunity to irritate the defendant." *Porter v. Henderson*, 59.
2. DEFENDANT CANNOT GIVE IN EVIDENCE, IN SUIT FOR SLANDER, IN CHARGING PLAINTIFF WITH PERJURY, that the plaintiff called him "a liar and a perjured wretch," on an occasion not shown to have any connection with the matter in controversy. *Id.*
3. IN ACTION FOR SLANDER, ALLEGING GENERAL DAMAGES ONLY, evidence is not admissible in mitigation that the plaintiff has stated that the slander did him no injury. *Id.*

SPECIFIC PERFORMANCE.

See RAILROADS, 2.

STATUTES.

1. LAW DOES NOT FAVOR REPEALS BY IMPLICATION. *State v. Wilson*, 163.
2. OLDER STATUTE IS NOT REPEALED BY LATER ONE, if, by reasonable construction, both may stand together; and the same principle applies to a repeal of the common law. *Id.*
3. COMMON LAW IS REPEALED BY IMPLICATION, when the whole subject is revised by a statute apparently intended to prescribe the only rules applicable thereto. *Id.*
4. COMMON LAW RELATIVE TO NUISANCES IS NOT REPEALED by an act imposing a penalty for occupying a building as a slaughter-house, without license, in the compact part of a town. *Id.*
5. STATUTES ARE NOT CONSTRUED SO AS TO OPERATE RETROSPECTIVELY, unless the intention that they should so operate is unmistakable; but that intention is not to be assumed from the mere fact that general language is used which might include past transactions, as well as future. *Seamans v. Carter*, 696.

6. JUDGMENT WHICH IS LIEN UPON HOMESTEAD IS NOT AFFECTED BY SUBSEQUENT PASSAGE OF STATUTE, providing that the owner of a homestead "may remove therefrom, or sell and convey the same, and such removal or sale and conveyance shall not render such homestead subject or liable to forced sale on execution or other final process hereafter issued on any judgment or decree"; and therefore the enforcement of such a judgment against a homestead, after a sale thereof, will not be restrained. *Id.*
7. STATUTE REGULATING OBSERVANCE OF SABBATH IS REMEDIAL, and should be liberally construed in respect to the mischiefs to be remedied. *Smith v. Wilcox*, 302.

See CONSTITUTIONAL LAW.

STATUTE OF FRAUDS.

1. PAROL CONTRACT TO CONVEY LAND IS WITHIN STATUTE OF FRAUDS, unless there has been such a part performance as cannot be compensated in damages. *McKowen v. McDonald*, 576.
2. PAROL CONTRACT TO CONVEY LAND IS NOT TAKEN OUT OF STATUTE OF FRAUDS by the fact that in pursuance of it, a son left his trade in town to go upon a farm, cleared and fenced the land, erected farm buildings, planted an orchard, and the like, under a promise by his father to give him the land in consideration of his services, and his coming to live thereon. *Id.*

STATUTE OF LIMITATIONS.

1. TRUST WHICH PREVENTS RUNNING OF STATUTE OF LIMITATIONS DOES NOT ARISE, WHEN, without fraud or concealment, or agreement to hold in trust, two of three attorneys engaged in a cause receive the fees for all. *Webster v. Newbold*, 487.
2. ACKNOWLEDGMENTS OF INDEBTEDNESS AND PROMISES TO PAY, TO TAKE CLAIM OUT OF STATUTE of limitations, must be explicit in their terms and unambiguous, both as to the engagement or acknowledgment, and also as to the sum of money intended to be paid or acknowledged. *Id.*
3. EXCEPTION TO BAR OF STATUTE OF LIMITATIONS must be taken advantage of by special plea and special replication. *Id.*
4. WHERE ACTION ON PROMISSORY NOTE, SECURED BY MORTGAGE OF SAME DATE, IS BARRED by the statute of limitations, the remedy upon the mortgage is also barred. *McCarthy v. White*, 754.
5. STATUTE OF LIMITATIONS IS STATUTE OF REPOSE, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. The view that the statute proceeds upon a presumption of payment, and that the effect of an acknowledgment is to rebut this presumption, and place the debt upon the original footing, is now exploded. *Id.*
6. STATUTE OF LIMITATIONS AFFORDS PROTECTION TO EACH OF TWO OR MORE PERSONS JOINTLY BOUND, and an acknowledgment by one is not available against another, unless he had authority to make it either expressly given or resulting from the relation of the parties; and this principle is applicable in cases where an attempt is made to enforce a security. *Id.*
7. SUBSEQUENT PURCHASER OF MORTGAGED PREMISES MAY AVAIL HIMSELF OF STATUTE OF LIMITATIONS as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured. And such purchaser is not affected by an acknowledgment of

the debt made by the mortgagor after the debt was barred, nor by an extension of the time of payment then made; and the fact that the mortgagee, when he received such acknowledgment and extended the time of payment, did not know of the purchase, is immaterial, where the period of limitation had already expired, and no consideration was given for the acknowledgment. *Id.*

See ANIMALS, 12.

STOCK.

See CORPORATIONS, 5, 6.

SUBSCRIPTIONS.

1. ACTION UPON SUBSCRIPTION.—Where a valid subscription of funds towards the erection of a bridge, according to certain plans, specifications, etc., and payable on demand, has been made, an action will lie for the recovery of the subscription before the erection of the bridge. *Brimhall v. Van Campen*, 118.
2. WHERE SUBSCRIPTION OF FUNDS TOWARDS ERECTION OF BRIDGE HAS BEEN PAID, and the contractor has failed to erect the bridge, the contributor can maintain an action for damages for breach of the contract. *Id.*
3. WHERE SUBSCRIPTION OF FUNDS TOWARDS ERECTION OF BRIDGE HAS NOT BEEN PAID, and the bridge has not been built as agreed upon, the failure to perform the contract may be pleaded in defense of an action for the sum subscribed, or in reply to it when offered as an offset. *Id.*
4. NO ONE CAN CHANGE PURPOSE FOR WHICH SUBSCRIPTION WAS MADE, without the subscriber's consent. *Id.*

SUNDAY LAWS.

VIOLATION OF SUNDAY ACT IS CONTRA BONOS MORES, and will not be sustained by the courts. *Id.*

See CONTRACTS, 2; STATUTES, 7.

SURETYSHIP.

1. SURETY IS NOT DISCHARGED BY ACT OF CREDITOR IN PARTING WITH SECURITY of the principal debtor, where he does so for the purpose of securing other property of greater value, which would be otherwise unavailable. *Young v. Cleveland*, 155.
2. SURETY ON NOTE SECURED BY TRUST DEED, by paying off the debt thus secured, becomes substituted to the rights of the creditor under the trust deed, and may enforce the lien for reimbursement, but not in such manner as to affect the rights to redeem of one who purchases the land at execution sale. *James v. Jacques*, 613.
3. WHERE WIFE BECOMES SURETY FOR HER HUSBAND on a note secured by trust deed by which the community property and her separate property are pledged for the payment of the debt, a purchaser at execution sale of the land cannot have the respective liens so adjusted as to apply the community property to the payment of the judgment under which he purchased, and the separate property of the wife to the payment of the creditor's lien secured by the trust deed. In such case, the separate property is not liable for the judgment lien, but is liable for the creditor's lien after the community property is exhausted, and all that the

execution purchaser can claim is the excess of the value of the community property over the creditor's lien. *Id.*

4. **STATUTORY PROVISION MAKING JUDGMENT IN ACTION AGAINST SHERIFF CONCLUSIVE AGAINST HIS INDEMNIFIER**, when the latter has been notified of the action, is founded on the principle that the action is, in substance, against the indemnifier, and that he has in that action an opportunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of such action, he cannot maintain a bill in equity to set aside the judgment obtained therein. *Dutil v. Pacheco*, 749.

See BONDS; SALES, 1, 2.

TAXATION.

1. **INTENTIONAL OMISSION OF TAXABLE PROPERTY OF CITY FROM ASSESSMENT ROLL** invalidates taxes levied thereon, notwithstanding such omission is made by the assessor for the sole purpose of giving effect to an ordinance passed by the common council of the city in good faith, under the honest belief that it had authority to exempt such property from taxation, for the purpose of advancing the interests of the city. *Hersey v. Board of Supervisors*, 713.
2. **UNINTENTIONAL OMISSIONS OF TAXABLE PROPERTY FROM ASSESSMENT ROLL** arising from accident, mistakes of fact, erroneous computations, or errors of judgment, do not necessarily vitiate a tax levied thereon. *Id.*
3. **ONE SEEKING RELIEF AGAINST CERTAIN ILLEGAL TAXES LEVIED ON HIS PROPERTY**, must pay the legal taxes levied thereon, before he is entitled to relief against the illegal taxes. *Id.*
4. **PARTY CLAIMING LAND UNDER TAX SALE** can maintain his title only when the law has been strictly pursued; therefore, when such sale is made within the court-house, under a statute requiring that it shall take place "before the court-house door," it is void, and passes no title. *Ruby v. Huntsman*, 143.
5. **TAX DEED IS PROPERLY EXCLUDED FOR UNCERTAINTY IN DESCRIPTION**, where the property is therein described as "a lot on Dupont Street, 137 feet and 6 inches from the northwest corner of Washington Street, with the improvements thereon, — 12x100." *Keane v. Cannovan*, 738.
6. **DESCRIPTION OF PROPERTY IN TAX DEED MUST BE CERTAIN IN ITSELF**, and not such as to require evidence *aliunde* to render it certain. *Id.*
7. **PAYMENT OF TAXES BY GRANTEE IN TAX DEED** for a portion of the time he was in possession under such deed, is not of itself, disconnected with other circumstances, evidence that the owner has abandoned the property. *Id.*
8. **PRESUMPTION IN FAVOR OF TAX DEED FROM LAPSE OF TIME** since its execution, and the possession of the grantee under it, can be indulged only in favor of acts between the assessment and the execution of the tax deed; but no presumption can be indulged in favor of the assessment itself, which is the foundation of all subsequent proceedings. It is only the intermediate proceedings, if any, that can be presumed in such cases. *Id.*

See EJECTMENT, 8.

TIME.

See ABANDONMENT; CONTRACTS, 3, 4.

TORTS.

See DAMAGES, 3; JUDGMENTS, 2.

TRADE-MARKS.

1. NAME ESTABLISHED FOR HOTEL IS TRADE-MARK in which the proprietor has a valuable interest that a court of equity will protect against infringement. *Woodward v. Lamar*, 751.
2. TENANT, BY GIVING PARTICULAR NAME TO BUILDING AS SIGN OF BUSINESS done by him at that place, does not thereby make the name a fixture to the building, nor transfer it to the landlord upon the expiration of his lease. *Id.*
3. WHERE IMITATION OF NAME OF HOTEL IS CALCULATED TO DECEIVE PUBLIC into the belief that it is the same name as the original, its use will be restrained by injunction, as where the name of the plaintiff's hotel is the "What Cheer House," and the defendant opens a hotel under the name of the "Original What Cheer House," the word "original" being painted on the sign in smaller letters than the residue of the title. *Id.*

TRESPASS.

1. PERSON PROCURING ILLEGAL ACT TO BE DONE BY ANOTHER IS CO-TRESPASSER with the person employed to perpetrate the wrong, and is equally responsible with him to the person injured, although not actually present when the trespass is committed; and the acts and declarations of the agent in performing such unlawful service are competent evidence against the principal. *Raisler v. Springer*, 736.
2. SINGLE DAMAGES ARE RECOVERABLE FOR TRESPASS, which proves to be casual or involuntary, though the complaint was in form for treble damages, under a statute allowing such damages for willful trespass. *Dubois v. Beaver*, 327.
3. ACTS OF TRESPASS PRIOR TO EARLIEST DAY LAID IN COMPLAINT may be proved under the New York statute, though trespasses laid under a *continuando* have already been proved. *Id.*
4. COMPLAINT IN TRESPASS DE BONIS NEED NOT, IN TERMS, ALLEGED "WRONGFUL TAKING," where the facts set up show a wrongful taking. Such an allegation is not one of fact, but a conclusion of law, arising from the facts stated. *Buck v. Colbath*, 91.
5. INSTRUCTION IN TRESPASS — CONFLICT OF LAWS. — Defendant pleaded, in an action of trespass *de bonis*, that he took the property under a writ of attachment out of a federal court, and as United States marshal; and that he took it as the property of another party, defendants in the writ. Such taking being admitted by the pleadings, it is erroneous to charge the jury that the right of property in the goods cannot be tried in the state court, and that there must be a verdict for defendant. *Id.*

See ANIMALS; CO-TENANCY, 3-6; GROWING TREES, 3; JUDGMENTS, 2.

TROVER.

See JUDGMENTS, 2.

TRUSTS.

1. INSTRUMENT RECORDED AS ASSIGNMENT AND DECLARATION OF TRUST. — Where a mother, entitled to the whole of the property of her intestate son, signed articles of agreement by which, after waiving her right to

administration and agreeing that letters issue to her son-in-law, it was agreed that the bulk of the property should be invested, the interest to go to an invalid son, while he lived, and principal to his brothers and sisters upon his death: *Held*, that such instrument must be regarded as an assignment and declaration of trust with a trustee competent to carry it into effect. *Cressman's Appeal*, 498.

2. AGREEMENT CONSTITUTING DECLARATION OF TRUST IS NOT REVOCABLE at the instance of a party competent to make it merely because some of the *cestui que trust* who joined in the instrument were minors, or under the disability of marriage at the time of its execution. *Id.*
 3. EQUITY WILL ENJOIN TRUSTEE FROM SUBMITTING TO ARBITRATION, without the consent and against the will of the *cestui que trust*, a question in which they alone are interested. *Crum v. Moore's Adm'r*, 284.
 4. TRUSTEE WILL NOT BE PERMITTED TO PREJUDICE RIGHTS OR INTERESTS OF CESTUI QUE TRUST by submission to arbitration; and if it be made without the approbation of the *cestui que trust*, he will not be bound. *Id.*
 5. TRUSTEE'S POWER TO SELL.—PURCHASER'S TITLE.—Where trustee holds land in trust to convey one half thereof to a certain party upon request, or if no request is made for a conveyance, to sell the whole, and account to the party named for one half of the proceeds of the sale, the trustee may sell the whole tract, or any part of it, and such sale will be in conformity with the trust; and if no request is made for a conveyance during the lifetime of the trustee, at his death his representative takes the land upon the same trust, and if he sells, the purchaser acquires a good title discharged of the trust. *Paul v. Fulton*, 125.
 6. RESULTING TRUST IS BEYOND CONTEMPLATION OF Texas statute respecting the rights of creditors, and is protected against one who acquires a judgment lien against it without notice, although a purchaser in good faith, for a valuable consideration, and without notice, would take the estate discharged of the trust. *Blankenship v. Douglas*, 608.
- See EXECUTIONS, 2; FRAUDULENT CONVEYANCES, 2, 3; GUARDIAN AND WARD, 2; HUSBAND AND WIFE, 1; STATUTE OF LIMITATIONS, 1; SURETYSHIP, 2, 3.

USE AND OCCUPATION.

See EJECTMENT, 5.

VENDOR AND VENDEE.

1. VENDOR OF LAND, UNDER EXECUTORY CONTRACT, CANNOT RECOVER BALANCE OF PURCHASE-MONEY FROM VENDEE, where he recovers judgment against the vendee, on the vendee's failure to pay the first installment due, and becomes the purchaser of the land at sheriff's sale. *Graf v. Kelly*, 580.
2. TITLE TO LAND IS NOT REVESTED IN GRANTOR BY SUBSEQUENT REFUNDING OF PURCHASE-MONEY, and the destruction of the deed by agreement of the parties, after its execution and delivery. But the grantee, or any one who claims through him, is estopped from showing by parol the contents of the destroyed deed. *Gugins v. Van Gorder*, 55.

See BONA FIDE PURCHASERS; STATUTE OF FRAUDS; TRUSTS, 5.

VENUE.

See PLEADING AND PRACTICE, 5.

WAREHOUSEMEN.

See COMMON CARRIERS, 10; PARTNERSHIP, 2, 3.

WARRANTY.

See ESTATES, 1, 2; SALES, 1, 11, 12.

WATERCOURSES.

1. OWNER OF DAM ON WATERCOURSE MAY BE LIABLE FOR FLOWING BACK WATER so as to obstruct the natural drainage of land lying near, but not bordering on the watercourse, unless such obstruction was caused by a reasonable use of his own land and privilege, and what is a reasonable use is ordinarily a mixed question of law and fact. *Bassett v. Salisbury Mfg. Co.*, 179.
2. IT IS NOT ESSENTIAL TO WATERCOURSE that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the waters entirely unmixed with earth, or flowing with any fixed velocity. *Id.*
See EASEMENTS, 3; INJUNCTIONS; NUISANCE, 2.

WAYS.

1. RIGHT OF WAY FROM NECESSITY, STRICTLY SPEAKING, DOES NOT EXIST. A way of necessity, such as the law recognises, results either from a grant or reservation implied from the existing necessity; and unity of possession at some former time appears to be the foundation of the right. *Tracy v. Atherton*, 621.
2. ENJOYMENT OF WAY AS OF RIGHT IS DEFINED TO MEAN an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by presumption and adverse user, or by deed confirming the right; or though not strictly legal, yet lawful to the extent of excusing a trespass. *Pierce v. Cloud*, 496.
3. TWENTY-ONE YEARS OF USE AND ENJOYMENT OF RIGHT OF WAY, AS OF RIGHT, CONFERS TITLE, and the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the right claimed by the other party. *Id.*
4. MERE DECLARATION OF ONE THAT HE USES WAY BY SUFFERANCE is insufficient to divest him of rights acquired by prescription. *Id.*

See HIGHWAYS.

WILLS.

1. ONUS IS UPON PARTY ATTACKING WILL when its formal execution is admitted, and it has been admitted to probate, but it is sought to set it aside on the ground of incapacity in the testator. *Farwell v. Brennan*, 137.
2. WILL IS VALID THOUGH NOT READ TO OR BY TESTATOR, where it is written, in his presence and according to his dictation, and executed in accordance with the statutes. *Hess's Appeal*, 551.
3. ALTHOUGH OPINION OF WITNESS AS TO SANITY of a testator is admissible, the question, "From your knowledge of him, would you think his mind sound enough to make a will?" is objectionable, as it involves a question of law for the court to determine, and not the witness, as to the *quantum* of mental capacity necessary to enable a party to make a legal disposition of his estate. *Turrell v. Brennan*, 137.

6. **JOINT WILL.**—An instrument by which a husband and wife jointly attempt to make a testamentary disposition of the property of both, to treat it as a joint fund, jointly devising the real property of the wife, and jointly giving legacies out of the personalty of both, cannot be admitted to probate as the will of either, or of both. Such an instrument is in its nature irrevocable, and contravenes the policy of the law. *Walker v. Walker*, 474.
 6. **JOINT WILL IS UNKNOWN TO TESTAMENTARY LAW OF THIS COUNTRY.** *Id.*
 6. **IN INSTRUMENT MADE BY HUSBAND AND WIFE AS JOINT WILL, IN WHICH** some of the bequests are several, and some joint, the former cannot be executed and the latter rejected, as the several provisions may have been influenced by the joint, and the intention of the testator would be thus defeated. *Id.*
 7. **IN PROCEEDING IMPROACHING VALIDITY OF WILL, IT IS IMPROPER TO RENDER** FINAL judgment on a demurrer to the answer. Whether the writing in question is the last will and testament of the party, is a question which must be tried by a jury. *Id.*
- See **EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCES, 2.**

WITNESSES.

1. **WITNESS MAY LEGALLY TESTIFY AS MATTER OF FACT,** that a seizure of property by an officer without lawful authority "was made in an offensive and insulting manner." *Raisler v. Springer*, 736.
2. **WITNESS WAS PERMITTED TO CORRECT HIS TESTIMONY** by stating, after having testified that a paper produced by him was a copy of a notice of protest sent to an indorser, that, in respect to the direction, it was not a copy. *Moses v. Ella*, 175.
3. **DEPOSITION OF COMPETENT WITNESS AT TIME IS NOT RENDERED INADMISSIBLE** by his subsequent marriage before the trial with the administratrix, on whose behalf the deposition was taken, where the cause for taking it still existed. *Cameron v. Cameron*, 652.
4. **GRANTOR IS COMPETENT WITNESS TO PROVE FRAUD IN DEED** to his deceased grantee under Ohio code, in a suit by his judgment creditor against him and the heirs of his grantee. *Bomberger v. Turner*, 433.
5. **HUSBAND IS COMPETENT WITNESS,** under the Wisconsin Revised Statutes, in an action by the husband and wife for an injury to the wife. *Barnes v. Martin*, 670.
6. **THAT WITNESS MAY BE UNABLE TO TESTIFY WITHOUT IMPLIED EXPRESSION OF OPINION** is no objection to his testimony upon questions relating to heights and distances, and as to the number, quantity, and dimensions of things. *Eastman v. Amoskeag Mfg. Co.*, 201.
7. **WITNESSES HAVING KNOWLEDGE OF PARTY'S HANDWRITING ARE COMPETENT TO TESTIFY AS TO ITS GENUINENESS,** but not to make a comparison of hands, for that is the province of the jury. *Travis v. Brown*, 540.
8. **EXPERTS MAY BE EXAMINED TO PROVE FORGED OR SIMULATED WRITINGS,** and to give conclusions of skill, but not to make comparisons with other authenticated papers, and express opinions from the comparisons. *Id.*

See **WILLS, 2.**

WRITINGS.

See **EVIDENCE, 14-22.**

WAREHOUSEMEN.

See COMMON CARRIERS, 10; PARTNERSHIP, 2, 3.

WARRANTY.

See ESTATE, 1, 2; SALES, 1, 11, 12.

WATERCOURSES.

1. OWNER OF DAM ON WATERCOURSE MAY BE LIABLE FOR FLOWING BACK WATER so as to obstruct the natural drainage of land lying near, but not bordering on the watercourse, unless such obstruction was caused by a reasonable use of his own land and privilege, and what is a reasonable use is ordinarily a mixed question of law and fact. *Bassett v. Salisbury Mfg. Co.*, 179.
2. IT IS NOT ESSENTIAL TO WATERCOURSE that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the waters entirely unmixed with earth, or flowing with any fixed velocity. *Id.*
See EASEMENTS, 3; INJUNCTIONS; NUISANCE, 2.

WAYS.

1. RIGHT OF WAY FROM NECESSITY, STRICTLY SPEAKING, DOES NOT EXIST. A way of necessity, such as the law recognizes, results either from a grant or reservation implied from the existing necessity; and unity of possession at some former time appears to be the foundation of the right. *Tracy v. Atherton*, 621.
2. ENJOYMENT OF WAY AS OF RIGHT IS DEFINED TO MEAN an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by presumption and adverse user, or by deed confirming the right; or though not strictly legal, yet lawful to the extent of excusing a trespass. *Pierce v. Cloud*, 496.
3. TWENTY-ONE YEARS OF USE AND ENJOYMENT OF RIGHT OF WAY, AS OF RIGHT, CONFERS TITLE, and the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the right claimed by the other party. *Id.*
4. MERE DECLARATION OF ONE THAT HE USES WAY BY SUFFERANCE is insufficient to divest him of rights acquired by prescription. *Id.*

See HIGHWAYS.

WILLS.

1. ONUS IS UPON PARTY ATTACKING WILL when its formal execution is admitted, and it has been admitted to probate, but it is sought to set it aside on the ground of incapacity in the testator. *Farwell v. Brennan*, 137.
2. WILL IS VALID THOUGH NOT READ TO OR BY TESTATOR, where it is written, in his presence and according to his dictation, and executed in accordance with the statutes. *Hess's Appeal*, 551.
3. ALTHOUGH OPINION OF WITNESS AS TO SANITY of a testator is admissible, the question, "From your knowledge of him, would you think his mind sound enough to make a will?" is objectionable, as it involves a question of law for the court to determine, and not the witness, as to the *quantum* of mental capacity necessary to enable a party to make a legal disposition of his estate. *Turrell v. Brennan*, 137.

6. **JOINT WILL.**—An instrument by which a husband and wife jointly attempt to make a testamentary disposition of the property of both, to treat it as a joint fund, jointly devising the real property of the wife, and jointly giving legacies out of the personalty of both, cannot be admitted to probate as the will of either, or of both. Such an instrument is in its nature irrevocable, and contravenes the policy of the law. *Walker v. Walker*, 474.
5. **JOINT WILL IS UNKNOWN TO TESTAMENTARY LAW OF THIS COUNTRY.** *Id.*
6. **IN INSTRUMENT MADE BY HUSBAND AND WIFE AS JOINT WILL, IN WHICH** some of the bequests are several, and some joint, the former cannot be executed and the latter rejected, as the several provisions may have been influenced by the joint, and the intention of the testator would be thus defeated. *Id.*
7. **IN PROCEEDING IMPROACHING VALIDITY OF WILL, IT IS IMPROPER TO RENDER FINAL** judgment on a demurrer to the answer. Whether the writing in question is the last will and testament of the party, is a question which must be tried by a jury. *Id.*

See EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCES, 2.

WITNESSES.

1. **WITNESS MAY LEGALLY TESTIFY AS MATTER OF FACT,** that a seizure of property by an officer without lawful authority "was made in an offensive and insulting manner." *Raisler v. Springer*, 736.
2. **WITNESS WAS PERMITTED TO CORRECT HIS TESTIMONY** by stating, after having testified that a paper produced by him was a copy of a notice of protest sent to an indorser, that, in respect to the direction, it was not a copy. *Moses v. Ella*, 175.
3. **DEPOSITION OF COMPETENT WITNESS AT TIME IS NOT RENDERED INADMISSIBLE** by his subsequent marriage before the trial with the administratrix, on whose behalf the deposition was taken, where the cause for taking it still existed. *Cameron v. Cameron*, 652.
4. **GRANTOR IS COMPETENT WITNESS TO PROVE FRAUD IN DEED** to his deceased grantee under Ohio code, in a suit by his judgment creditor against him and the heirs of his grantee. *Bomberger v. Turner*, 433.
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See WILLS, 2.

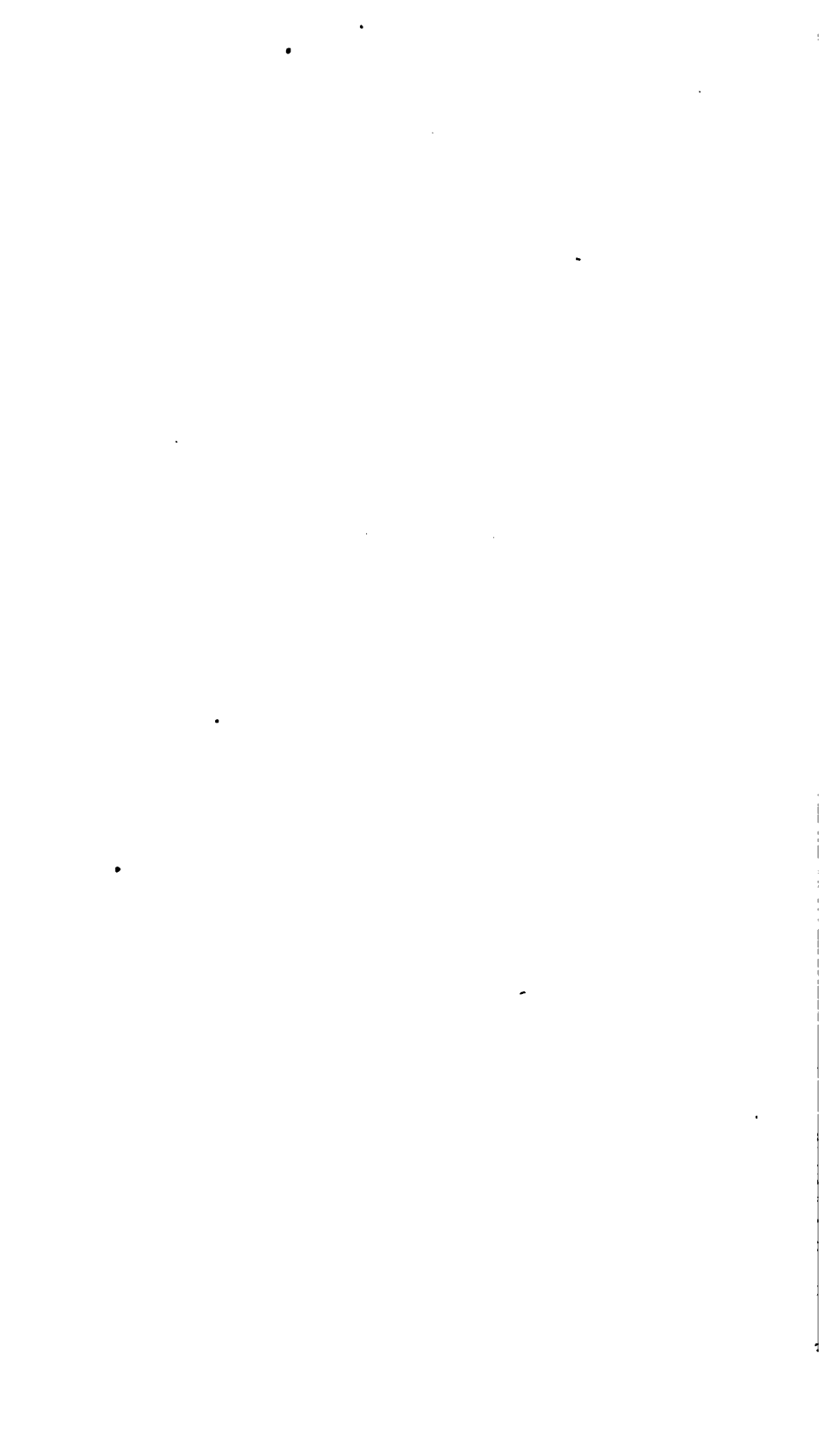
WRITINGS.

See EVIDENCE, 14-22.





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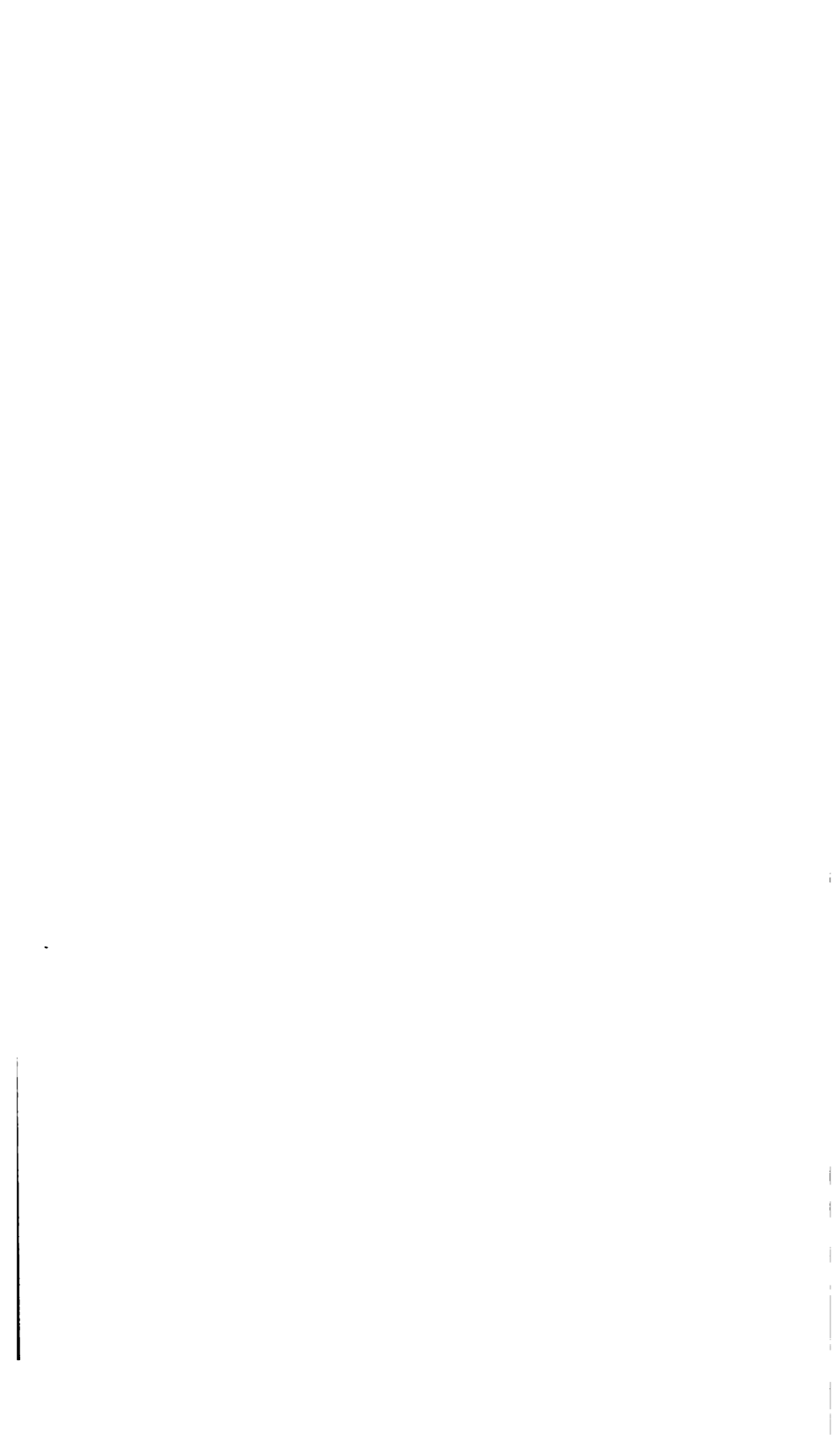
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